THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW.

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ADVERTISEMENT.

This work was printed many years ago.

Circumstances prevented its being at that time exposed to sale.

In regard to the Author, all that need be said is—that it was not by him that it was then kept back; and that it is not by him, or at his instance, that it is now put forth.

If, on either accounts, it were desirable that the causes of its being thus long withheld should be brought to view, those causes would afford a striking illustration of the baneful influence of the principles and practices it is employed in unveiling, and presenting in their true colours.

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ELEMENTS OF PACKING,

AS

APPLIED TO JURIES.

PART. I.

CHAP. I. Occasion of this Work.

§ 1. *Work on Libel Law commenced—Occasion of it.*

WHAT gave rise to this work, is neither more nor less than a *newspaper* article—an article in the *Times* for the 20th of February 1809, and which, so far as it belongs to the *present* purpose, and consists of statements concerning matters of *fact*, is in these words:

Speaking of a clamour against what is called the *licentiousness* of the press, the article goes on and says—" Such has " been the dread inspired by this clamour, ... that of the " persons now under prosecution, two have actually *pleaded* " *guilty* to informations for ' *wilfully and maliciously slander-* " *ing the British army*,' who never, till many days after their " publication, saw or heard of the libel with which they " were charged. . . . .

" The grand fountain of all this mischief (it continues) " seems to be *Major Hogan's* pamphlet : . . . . ; for this " very work there are now, or recently have been, we be- " lieve, *six-and-twenty* printers and publishers under prose- " cution. It was only from one of these that the original " pamphlet sprung : the rest did no more than extract from " or recommend it, and that upon the attested character of " its author, who was no sooner known to have fled from " his charge, than every one of them retracted his praise of " the work, and was willing to maintain that the *Duke of*

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"*York's* character stood as fair as if this individual arraign-
"ment of it had not been published; yet is this so far from
"having produced a disposition to recede from punishing
"them, that though the informations were all of them filed
"last term, and might have been tried during the present,
"the objects of them are, without any assigned cause, to be
"kept in a harrassing state of suspense over the present to
"the term ensuing.

"And what is the origin of these men's offences? an error
"common to them with the prosecutor—a belief in the re-
"spectability of *Major Hogan's* character, which was attested
"by no fewer or less men than Generals *Fox*, *Floyd*, *Whyte*,
"*Dundas*, *Macdonald*, *Hall*, *Hay*, *Tilson*, *and Hamilton*.

"Can there be a stronger palliation of error, than that the
"person erring should have been misled by a man of such
"reputation as the above; more especially when it is con-
"sidered that the *Duke of York* was himself as much deceived
"as any one else by these testimonies in favour of *Major*
"*Hogan*? his Royal Highness, on the strength of them, be-
"lieved him to be deserving of rank and elevation in the
"army, and therefore '*noted him for promotion*.' Others, on
"the very same authority, supposed only that he might be
"entitled to common credit, and are, therefore, notwith-
"standing all their renunciations of that opinion, '*noted for*
"*prosecution*.'"

Thus far the newspaper. Facts, in their nature so noto-
rious, seemed not likely to have been either invented, or so
much as materially misrepresented. I looked out for contra-
diction or correction, but could hear of none. Whatever
I could learn went in confirmation of the statements given
as above.

On the subject of *Libel Law* my general conception had
been of some thirty or forty years standing: for example,
that, in point of *actual law*, a *libel* is any paper in which he,
who to the *will* adds the *power* of *punishing* for it, sees any
thing that he does not *like*: and, in point of *public utility*, that
it was neither necessary nor fitting, that *any* part of the *rule of*
action, much less so important a one, should be lying in any
such wild, and barbarous state. Such on *this* subject be-
came my opinion, almost as early as, on the subject of *any* part
of the law, I could take upon me to have any: but those
opinions would scarcely have found any expression, in public
at least, and in any considerable detail, but for the incident
above-mentioned.

Seeing thus that under the mask of a temporary occurrence, a battery had been opened by the enemies of the constitution upon *the liberty of the press*—that a fire of grape shot had already been commenced, and no fewer than six-and-twenty persons wounded by it at one discharge, I felt myself urged by an irresistible impulse to summon up whatever strength I might have left; and howsoever impotent my own feeble efforts might prove, and at whatever personal hazard, to shew the *way* at least how this battery might be spiked.

1. Libel Law as it stands, or rather as it floats, is incompatible with English liberties.

2. To destroy them utterly, and reduce the Government to a despotism, it requires nothing but to be consistently and completely executed.

3. In this state it must remain, until either the Constitution is so destroyed, or, by authority of the legislature, certain arrangements are made, the basis of which will be a definition, in form, of the sort of thing called *a libel*, or something that shall be equivalent to it.

4. In a fixation of this sort, though there is some difficulty, there is no natural impossibility.

5. It is from the hand of *Parliament* alone that this crying evil can receive a *radical* cure.

6. But, in the intelligence and fortitude of a *Jury*, it may in each instance, receive a momentary *palliative*.

7. Things being on this footing, in the case of a *political libel*, and—(to fix conception)—in the case of the libel for which *Mr. Cobbett* was convicted, and *Mr. Justice Johnson* suffered, had I been upon the Jury, I should not have regarded it as consistent with my oath and duty to join in a verdict of *Guilty*.

8. Applying to this use the power which, under the law of primæval barbarism, any *one* determined Juryman has of subduing the *eleven* others, I should have taken care that no such verdict should be found.

9. By a few successive exertions of such fortitude, not only momentary and partial relief against particular oppression would be afforded in each particular instance,—

10. But by a gentle and truly constitutional pressure, measures of complete and permanent relief might, as from the *unjust* Judge in the *parable*, be extorted from the legislature.

Such were the opinions, in support of which I was pre-

paring to submit to the public the considerations by which they had been produced: when by another incident this design, though it received a *confirmation*, and that no slight one, received at the same time a *collateral turn*, and, as to *this* part of it, a temporary *stoppage*.

§ 2. *That Work why postponed to this.*

" JURYMEN—Special Jurymen—are the persons you pro-" pose to address. But, whatever you had to say, it being to " this effect, is there any the least chance that they would " listen to you? The men whom, under the name of *Jurymen*, " *special jurymen*, you would, on any such occasion, have to " deal with—are they in *fact* what they are *said* to be, and in " general *supposed* to be? On any occasion, such as that in " question, are they really free to follow the dictates of *their own* " judgment? Can you see any the smallest probability of their " doing so?" Such were the questions suggested to me by the publication of the late *Sheriff*, *Sir Richard Phillips*, a document which, though it had been for some time in circulation, had not, till a considerable progress had been made in my own above-mentioned work, happened to fall into my hands. Such were the *questions*; and, to my unspeakable astonishment, no sooner were they formed than they received, each of them, to my apprehension, a decided *negative*.

In common with the generality of my countrymen, no particular incident having ever happened to point my attention to the subject, I had been used to annex in my mind to the word *Jury*, the idea of a momentarily assembled body of men, composed of members determined by *lot*, or if by a nomination, a nomination not differing in effect from determination by lot,—the nomination performed afresh for the purpose of each cause, the list of the members of which the body was composed in each cause, changing perpetually as between cause and cause.

In this particular I had indeed understood the term *special jury* to be expressive of some difference: but a difference by means of which, the advantage attached to a fortuitous assemblage being preserved, further advantage, resulting from a sort of *reciprocal choice* as between party and party, had, by the matured sagacity of modern times, been superadded.

In common with such others of my countrymen, whose

education has conducted them through the *ordinary* paths of *history*, I had read of a species of judicial abuse, which, under the name of *packing*, had on this or that occasion broken out in former times, and in particular in the profligate, and arbitrary reigns of the two last Stuarts.

My astonishment has not oftentimes been greater than it became, when, upon looking into the book for which, as above, the public is indebted to the late shrievalty of *Sir Richard Phillips*, I found that this practice called *packing*, a word which, when thus applied, had never presented itself to my mind but in the character of the denomination of a state crime, nor that exemplified but rarely, and under a disastrous state of things long since past, had been moulded into a *system*, had become an established practice—a sort of *practice* which by the quality of the practitioners has, as *ship-money* had once, acquired the force of *law*; and that in that character it had found, in the person of the Chief Judge of one of the three great common law courts, not only an *agent*, perhaps an *author* to avow it, but moreover a *champion* to defend it.

For some time I could scarce give credit to my own eyes. Am I indeed awake?—Is not this a dream?—What century is this?—Can it be the 19th?—Is it not the 17th?—Who reigns now?—Can it be a *Brunswick?*—Is it not a *Stuart* king come, according to the prophetic and once loyal hymn, "*come to his own again?*"

It is but too true. Under the name of a Jury—under the name even of that supposed improved species of Jury, a *special jury*, we have, in fact, avowedly, in that court in which *most use* is made of Special Juries, and at pleasure in the only other judicatory in the corruption of which the servants of the crown, and their adherents, can, as such, have any special interest—a *standing* body of assessors, instruments tenanted in common by the leading members of administration, by the Judges, and by the other crown-lawyers—troops enlisted, trained, and paid by the crown-lawyers, liable to be cashiered, each of them, at any time, and without a word of explanation, each of them at the instance of any of the above indefinite multitude of *inspectors*, as well as by the hand of the *recruiting officer* who enlisted them, and they know not who besides—tools, *in effect*, of the very power to which in pretence and *appearance* they are a *check*.

Great would be the error, if it were supposed that, so far as concerns the security afforded by *Juries*, the higher cri-

minal cases excepted, we are, under this *special jury system*, no worse off than our ancestors were in the time of the two last Stuarts. *Package of Juries* was in those times no more than an effort of *casual* violence and passion, losing more by the general irritation it produced, than by the particular advantage of the moment it could gain. It is now, as will be seen, become a *regular*, a *quietly established*, and *quietly suffered* system. Not only is the yoke already about our necks; but our necks are already *fashioned* to it.

As to the *title* of this work, *Elements of the Art of Packing*, it is not a mere jest. In the bringing of the system to its present state, no small degree of ingenuity, it will be seen, has been expended; nor, to the present purpose, could the true nature of it have been sufficiently displayed, without considerable labour, in short without a pretty ample course of developement—applied to its *objects*, its *effects*, its *motives*, and its *means*.

In bringing into view this sinister species of art, the object of these pages is—to do what may be found capable of being done, by an obscure individual, towards putting an end to the exercise of it: and the more thoroughly the processes employed in it are brought to light, the more imperious will the considerations be seen to be, which call for the abolition of it.

By the abolition of *special juries*, if complete, and in point of *local* range rendered co-extensive with the whole kingdom, a sort of *gap* might appear to be left in the system of *jury trial:* on what principles this gap may be most advantageously *filled up*, will be matter of enquiry at the conclusion of the work.

CHAP. II. JURIES—THEIR USE AS A CHECK TO JUDGES.

Of the functions exercised by the body of unlearned assessors, termed *Jurors* or *Jurymen*, the original intention, as well as experienced use, seems to be universally agreed, as well as understood, to be—the serving as a check upon the power of the learned and experienced Judge or Judges, under whose direction, or guidance at least, they have to act. In name, the decision pronounced in each cause, that decision at least to which the name of *verdict* is given, and in

which not only the question of fact is decided upon, but a decision on the question of law (except in the particular case of a special verdict) is involved, is ascribed to them, as if it were theirs alone: but, besides the power of sending the cause to a *new trial* before another jury, the effect of the power exercised by the professional Judges is upon the whole so great, (the verdict having in no instance any effect until it be followed by a corresponding decision distinguished by the name of the *judgment*, the formation of which depends altogether on the professional part of the compound judicatory)—that a conception nearer to the truth will be formed, by considering the *main* or *principal power* as in the hands of the *Judge*, that of the jury serving as a check to *his* power, than by considering the *principal power* in the hands of the *jury*, that of the Judge serving as a check to *theirs*.

That, of the unlearned body so designed to operate as a check the members ought, so far as concerns the exercise of the functions belonging to their body, to be in a state of independence—of *independence* as perfect as possible—is a proposition included in the very denomination of a *check*. To deny the truth of it is to utter a contradiction in terms. To say that there ought not to be any such independence, is the same thing as to say that there ought not to be any such check.

In *appearance* this sort of independence is, in modern practice, every where, in every part of the field of jury-trial, actually preserved. That which, on the occasion of each trial, the Judge or Judges, who constitute the professional part of the mixt judicatory, have power, say, for shortness, the *Judge has* power to do, is to compel the non-professional part, the jury, to pronounce a decision, termed its *verdict:* that which he has *not* the power to do, is to determine *what* that verdict shall be.

Great, however, as is the power of the Judge, in every case, over the ultimate result of the cause, yet, so far as concerns the decision pronounced or supposed to be pronounced by the jury, it applies more directly and certainly to the *prevention* of a verdict *contrary* to his wishes.* than to

* In this case in the hands of the Judge, the most efficient instrument of injustice may be seen in the principle and practice of *nullification:* by which, considered as applied to verdicts, the effect of them is destroyed, on pretences that do not so much as profess to have any relation to the *merits* of the cause. The pretence has always been the existence of some *regulation*, or (as it is called, to screen its non-existence from notice) some *rule* which, besides that it was never fit to have existence, had never—so far from having been sufficiently notified beforehand, in such manner as to afford to those who were punished for not

the *obtaining* at their hands a verdict *conformable* to his wishes.

When therefore, in pursuance of a sinister interest, in whatsoever bosom it may have happened to it to originate, *his own*, for example, that of the King, or that of any servant of the King's in any other department of the state, it has come to be an object with a Judge to *obtain* at the hands of a jury a *verdict* in any way contrary to justice, a necessary endeavour has been to *obtain a jury*, so composed, as that the verdict pronounced by them may be depended upon as about to be conformable to his wishes; to give, in a word, to the judgment, which he has it in his wish and intention to pronounce, the *appearance* of being the proper and necessary result of an antecedent decision, which, under the appropriate name of a *verdict*, the jury have, by the mouth of their foreman, pronounced, or at least been *considered* as having pronounced.

If, in consequence of any sinister influence exercised over their faculties by the Judge, a verdict, different from what would otherwise have been pronounced by them, has been pronounced, that influence will have assumed a very different character, and have been produced by causes of a very different description, according as it is to the *understanding* or the *will* that in each bosom it has applied itself.

To the *understanding* of a juryman, as of any other man, though influences, which, being unfavourable to justice, may be termed *sinister*, are liable to apply themselves from other quarters, yet so far as it has happened to any such influence to have been applied by any act of the *Judge*, it is only by his

having obeyed it the possibility of obeying it—had never so much as been in existence. It was on each occasion invented, and set up, for the purpose of the particular injustice that was to be done.

Wrapped up in this device as in a cloak, the power of English judges has, under the semblance of limitation, been in every part of the field of *jury trial* (not to look at present any further) little less than arbitrary: and to this hour on each occasion, as often as a judge is called upon to use this instrument of iniquity, it is in his power to apply it accordingly, or to refuse to apply it, which ever course happens to be best adapted to his sinister *interest*, if he has any; if not to his *humour* or *caprice*. [See *Scotch Reform*, Let. 1. Devices of Technical Procedure: Devices 9 and 20.]

And, besides being applicable as above, in repugnance to the *main* end of justice, *viz.* giving execution and effect to those rights which have been conferred by law, it has in pursuit of sinister interest in the shape of *lawyer's profit*, been, and continues to be applied, throughout the whole field of law, in repugnance to the *collateral* ends of justice, *viz.* avoidance of *unnecessary delay*, *vexation*, and *expence*.

understanding, by the application of his relatively stronger understanding to their relatively weaker understandings, that it can have been applied: in a word, it can only have been *the influence of understanding on, or over, understanding*.

When it is to the *will* of the juryman that any sinister influence acting in a sinister direction has been applied by the Judge, it is by the *will* of the Judge that it has been applied: it has been *the influence of will on, or over, will*.

In so far as the prescriptions of *duty*, the dictates of *probity*, are taken by the juryman for the rule of his conduct, no *other will* is by *his will* suffered to exercise any influence on it: his *will* takes for its guidance the dictates of *understanding* purely: of *his own* understanding, if it feels itself strong enough: if not, of some *other* understanding, on the relative strength of which (relation being had to the question in hand) its reliance is more assured.

To the dictates therefore of any other *will*, the will of a juryman, as of any other judge, (the lawfully declared will of some lawful superior alone excepted, for which in the case of the juryman there is no place) cannot so much as listen but at the expence of probity. From whatsoever source it happens to it to flow, whether from the will of the Judge, or any other will, the influence, or, as in this case it is stiled, the *temptation*, to the assaults of which the probity of the *individual* (in the present case the *juryman*) stands exposed, will apply itself in one or other of two shapes: in the shape of *evil*, *viz.* ill-applied *punishment*, working by *intimidation*; in the shape of good, *viz.* ill-applied *reward*, working by *corruption*.

Against these two opposite dangers, provision was made in the principles which presided over the original organization and mode of procedure that took place in the case of these singularly constituted *judicatories*, or rather *component parts* of judicatories.

Against undue *intimidation*, they received for their protection, in the first place, exemption from any infliction which, avowedly and under the name of *punishment*, might otherwise have been applied to any of them *separately** by the arbitrary power of the judge; in the next place, (being that without which the other would have been of little value) the veil of secrecy, to preserve to them, during their conferences,

* In the case of the now obsolete mode of procedure called *attaint*, a juror could not be proceeded against but in conjunction with all the rest.

the *faculty*, and (to render it more effectual) the *obligation*, of keeping themselves during their conferences, out of the reach of his observation: and not of *his* only, but of that of all *other men*, and especially all other *men in power*, in whose *enmity* they might be apt to behold a source of *danger*.

Against *corruption*, the principle employed was that of *continual change;* no person being continued in the exercise of that function for any length of time: that so, neither the seductive artifices of the judge, their *natural* tempter, who in *their* power had before his eyes a force constantly antagonizing with *his own*, might have *time* to mould into undue obsequiousness the weakness of their minds; nor the *casual* tempter—the party who, in the event of his obtaining any where a sufficiently steady view of a future juryman, against whose probity his operations might be directed with a sufficient prospect of success, might find himself disposed to apply the opportunity to any such sinister use.

CHAP. III. The Check how done away by Influence.

§ 1. *Checks are ever odious to all Persons checked.*

To the welfare of the governed—of men considered as men subject to *power*—it is highly *conducive* at least, if not, (as under the British and other mixt or limited governments, men are apt to say,) altogether *necessary*, that in whatsoever hands *power* be lodged, *checks* to it, in some shape or other, should, throughout the whole field of its exercise, be applying themselves: and upon the supposition that the *good*, which, in the shape of *security against misrule*, is thus produced by the check, is not exceeded by the *evil* produced by the defalcation made by it from the quantity of power necessary to enable the holder of the power to render in the highest degree of perfection the service expected at his hands, the *utility* of the check will hardly find any person to dispute it.

But whatsoever be their utility, relation being had to the interests of the *people* considered as subject to power, to *the hands by which the power is holden*, the sensation produced by any thing which acts upon them in the character of a *check*, never has been, nor ever can be, otherwise than unpleasant.

How it happened that, in *England*, the operations of the king's ever dependent Instruments, the official *Judges*, (not to speak of the equally dependent instruments of his imperfectly subjected subordinates, the great Barons,) found themselves, in the infancy of the constitution, incumbered, and to so great an extent, by the presence and interference of a determinate number of unofficial assessors, still more ignorant than themselves; while, in the *other* part of the same island, the incumbrance was confined to the criminal division of the field of law, and even there to the upper parts of the ground; and while, on the continent, either no such incumbrance was ever known, or was at a very early period got rid of; these are among those points of legal history, the obscurity of which seems to have given them up beyond redemption to the arbitrary dominion of conjecture.

Thus much however appears with tolerable distinctness; *viz.* that, over a great part, if not the whole of that field, over which the jurisdiction of a limited and even fixt number of *assessors*, under the denomination of jurymen, *(petty jurymen,)* extends itself, the sort of function now exercised by them was exercised by an unlimited and usually much larger number of the inhabitants of the district in question under the name of *freeholders*: by which denomination were distinguished the whole of that comparatively small number of persons whose interests, according to the notions moral and legal of that time, had any claim to notice: and that, of this larger and imperfectly determinate body, the part now called a *jury*, was a sort of *select committee*, gradually and by general consent, the result of general convenience, substituted to the ever fluctuating and unwieldy whole.

But though, in one shape or other, the incumbrance has from the earliest days of the existing constitution, been clinging to the shoulders of the official judge, yet, in whatsoever shape it clung, it could not have been otherwise than a troublesome one.

To the free exercise of his *power* the obstruction given by it is sufficiently obvious: for, so often, and in such proportion, as he found it necessary to give effect to a *will* on their part, which, howsoever expressed, differed ultimately from his own wishes, so often, and in the same proportion, was his *power* converted into *impotence*.

Supposing even his *will* to have been in every instance ultimately and completely prevalent, and, notwithstanding

the incumbrance, his *power* thus far unimpaired, even thus, on comparing his situation with that of a judge the freedom of whose actions is unrestrained by any such incumbrance, it will be manifest enough, that though his *power* were ever so intire, one effect, inseparably attached to the nature of this incumbrance, is—to afford, in one way or other, perpetual disturbance to his *ease*. All their desire is to shape their wills to his, and for that purpose to know what it is. Be it so. Yet to this purpose it may be necessary for him to *make* them know what it is; and simple as it may be, to impress into their minds this article of knowledge will, every now and then, require on his part, one of those operations which cannot always be performed without more or less *disturbance* to the operator's *ease*.

On the other hand, suppose on their parts any reluctance towards the adoption of his will, *argument*, in some shape or other, would on his part be necessary to the *surmounting* of that reluctance; and so much argument, so much time and trouble consumed, so much disturbance given to his ease. Let there even be no reluctance opposed to his will, yet, if in their conceptions there should be any *difficulty* in comprehending it, still, to the removing or endeavouring to remove any such difficulty, *explanation*, in some shape or other, would be necessary: more consumption of time and trouble; more disturbance given to ease.

But to a man in power, it neither then was, nor to this time is, no, nor ever will be, *natural* to submit readily to any such *limitation to his power* as he can commodiously get rid of: it neither then was, now is, nor ever will be, natural to him, to suffer his own *ease* to remain exposed to any *disturbance*, from which he can conveniently keep it clear. To keep it to a certain degree *habitually* clear of disturbance, may, from time to time, cost him more and more *labour*, giving to his *ease* more and more disturbance. But, be his expectations of neat profit, in that valuable shape, verified, or not, by the event, his exertions will not the less truly have had for their motive, *the love of ease*.

On both these accounts therefore, and in which ever of the two shapes he found the weight of this body of assessors pressing upon him, the endeavours of the judge to shake off or lighten the incumbrance cannot but have been coeval with its existence.

In the character of a sinister motive, becoming, in the

bosom of the judge, an efficient cause of injustice, *the love of ease* seems hitherto to have almost escaped notice. But it has not been the less efficient; and of its efficiency exemplification but too extensive will meet us as we advance.

§ 2. *Judges' Defences against Checks—Corruption and Deception.*

HENCEFORWARD let us suppose the use of *juries* firmly established: and of the part originally acted by the promiscuous assembly to which this *select committee* succeeded, all distinct remembrance, as well as desire, obliterated: obliterated by this primæval *Grenville Act*, of which the record is no where to be found.

For securing on the part of this select body of assessors, whose office was to keep a check upon his will, a subservience as constant and prompt as possible to that will, thereby impairing as far as possible the use and efficacy of that check, three possible instruments, as above brought to view, were afforded by the nature of the case: *viz. intimidation, corruption*, and *deception:* for such is the name that may with propriety be given to the influence of understanding over understanding, as often, and in proportion as the exercise of it is recognized as operating to the prejudice of justice.

As to *intimidation*, in the character of an instrument of influence applicable to the purpose here in question, it must, from the very first, have been too plainly incompatible with the acknowledged constitution of this compound judicatory, and too insupportable to the feelings of the people, to be in any thing like constant or even frequent use.*

Of punishment applied to this sinister purpose by the sole power of the judge, in the shape of pecuniary *fine* for instance, examples seem to have been not altogether wanting. But, forasmuch as such a practice could not have been permanently *established*, without the utter destruction of the power of juries, the existence of that power is a sufficient

* *Attaint* was, indeed, terrific enough, involving the utter ruin of all those whose lot it was to suffer under it. but to the sinister purpose here in question it was manifestly unsuitable; for it could not be inflicted on the refractory twelve, without the concurrence of double the number of other jurors, and those rendered by their rank still more highly proof against sinister influence, in every one of its three shapes.

proof that of that suffering, though applied under the name of *punishment*, and by *judicial* hands, the infliction could never have been considered in any other light than that of a casual act, committed under the spur of extraordinary irritation, by illegal violence.*

Corruption, the work of will operating upon will, and *deception*, operating by the influence of understanding over understanding, were therefore the only instruments affording any promise of being regularly and steadily applicable to this sinister service: *viz.* the securing of undue obsequiousness on the part of juries.

§ 3. *Corruption—Modes of applying it.*

In regard to *corruption*, the standing problem *was*, and *is*, so to order matters, that, on each given occasion in which it may happen to the judge to take on any account an interest in the verdict of the jury, it shall depend upon his *will*, with the surest effect, and with the least trouble possible, to mould it to his own desire.

To this purpose, on the occasion of each verdict, the concurrence of two circumstances was, and is, necessary:

* In the State Trials we have a precedent of a Judge, a Lord Chief Justice of the King's Bench, who, to help satisfy the conscience of a Juror, treated him with a good shaking-bout. The time was soon after the Restoration, anno 1664: the Chief Justice, a *Hyde*, a relation and *protegé* of Lord Clarendon's: the defendant, a *libeller*, an Anabaptist: the libel purely of the *heretical* class, a class of libels of which happily much has not been heard of late years, at least under that name. It was however "seditious and venomous" enough: and the sedition and venom of it consisted in maintaining, contrary to the Liturgy, that the proper age for Christians to be baptized at, was the age the apostles baptized them at—with other abominations of the like stamp.

The juryman, through the medium of whose conscience the consciences of the rest received satisfaction in this mode, had made a visit to the bench, and as it should seem by deputation from his fellows: permission had been granted, in consequence of their "desire to know whether one of them might not come and "speak with his Lordship, about something whereof they were in doubt." "Then the officer called *one*" (quære by whom named—must it not have been by the Judge?) "and he was set upon the clerk's table, and the Judge and he whis- "pered together a great while; and it was observed that the Judge, *having his* "*hands upon his shoulders, would frequently shake him as he spoke to him.* Upon "this person's returning, the whole jury *quickly came in*, and being according to "custom called over by their names, the clerk proceeded—

"*Clerk*—Are you agreed in your verdict?

"*Jury*—Yes, yes. 2 St. Tr. 553."

The unanimity thus promptly produced, by which species of influence was it produced? by the influence *of will over will*, or by the influence of *understanding on understanding*? perhaps partly by the one, partly by the other.

1. That, in the event of their finding themselves in the *situation* requisite, (*viz.* that of inhabitants of a jury-box) there should exist a sufficient number of persons *disposed*, no matter by what causes, to manifest the sort of *obsequiousness* requisite: 2. That matters should so have been ordered, that in that requisite situation the persons so disposed should in each instance be to be found.

There are two courses or orders of proceeding, in either of which this supposed unjust, but supposed desired result is capable of being produced: 1. Finding out persons in whose instance the requisite *disposition* is already *formed*, and thereupon placing them in the *situation* requisite.—2. Going to work with a set of persons already stationed in the *situation* requisite, and to the persons, so situated, giving the *disposition* requisite.

The first of these two courses is that which, having been invented in the time of our ancestors, in a somewhat distant age, has from them received the name of *packing*:—a name which, from the application at that time but too frequently *made* of the practice, and thence habitually apprehended from it, has acquired a *dyslogistic* tinge: serving at present to express, not merely the *practice itself*, but the sentiment of *disapprobation* excited by the idea of it, and thus, by the principle of association, attached to it.

Of the two courses, this antient one is evidently by far the most simple.

In the other may be seen an example of a degree of refinement reserved for modern times. *A number of persons whose dispositions, in regard to the subject in question, are as yet unformed or unknown, being collected—required to generate in their breasts the disposition requisite.* Such is the problem, the solution of which was necessary to the pursuing of this second of the two courses. And, with what success it has been accomplished, will, ere long it is supposed, be not indistinctly visible.

For this purpose the following process stands alike approved by theory and experience.

Into the situation in question (it being a situation conferring power—legal power) cause to be placed the number of persons requisite (they being provided with the requisite legal qualifications)—you possessing in your hands, to a certain extent, the faculty of influencing their interest or welfare (that is, producing in their respective bosoms the sensation of pain or pleasure, or the eventual absence of either)—and no *preponderant* force acting on the same

bosoms in an opposite direction—these things being done, the exercise of that power is thereafter at your command: and this, whatsoever be the name given to the act of power so exercised—such as *verdict*, *judgment*, *decree*, *sentence*, *vote*, *resolution*, *statute*, *law*.

In the science of *psychological* or *moral dynamics*, of which *political* is one branch, the above proposition, though never yet perhaps reduced to any scientific form of words, may be stated as a fundamental axiom: and among public men, under whatsoever degree of incapacity labouring in other respects, no man was ever yet found to any such degree weak and incapable, as not to be sufficiently sensible of the truth of it.

A man may receive his ten, twenty, thirty, any number of thousand pounds a year, on pretence of his occupying a *writing clerk's* place, and this without being any more *able* than he is *willing* to do the duties of that place—and yet be no less fully and adequately impressed with the truth of the above proposition, long-winded as it is, than *Bacon* was, and accordingly not only act, but get up and speak, according to his mode of speaking, in exact conformity and consequence: the orator, without parade or pedantic display of hard-worded science, acting *psychological dynamics*, all the while, and to no less perfection, nor, if told of it, less perhaps to his surprise, than *Monsieur Jourdan*, when upon being thereof informed by his preceptor, he found himself talking *prose*.

For effecting the solution in question by the application of the above axiom or rule, the simplest and most elegant of all modes which hath as yet been invented, perhaps, it may be added, which the science itself admits of, is—that which you are enabled to put in practice, when the functions attached to the situation being, by a mass composed of the matter of wealth or other objects of desire (instruments or efficient cause of pleasure of any sort at command according to each man's taste,) worked up into a compound of an agreeable flavour, the continuance of the person in question in the situation which enables him to feed upon it, has been made dependent on your will. So long as he continues in the situation, with such his allowance in his hand, he will continue to feed upon it in his heart—if not with thanksgiving for having been put into the situation—at any rate, what is most to the purpose, with fear of being put out of it, in the event of his comporting himself otherwise than as expected.

Suppose, for example, the situation of a *juryman* thus at the same time dulcified, and (saving dismissal) *fixed:* the power of *dismissal*, howsoever disguised, (and the more effectually disguised the better) being at the same time in your hands: upon the very face of this statement it is evident, that (barring the accident of opposite and preponderant force as abovementioned) the verdict of the jury, so far as depends upon that juryman, is altogether at your command.*

In this mode of solution, a necessary step, we see, is the placing the person in question in a *situation* in which he is exposed to the action of the efficient cause of influence: *viz.* the matter, the ever pliant and ductile matter, which, in your plastic hands, becomes the matter of *reward* or the matter of *punishment*, according as he behaves himself. But to the situation, as above described, *permanence* is necessary: and this—partly because without a certain degree of permanence the situation would not possess sufficient value, nor consequently the fear of losing it act on his mind in the character of an efficient cause of influence with a sufficient degree of force: partly because the correspondent disposition—*viz.* a disposition duly prepared to yield to the influence—the *obsequiousness* in a word—may not always be capable of being produced in an instant, as in the case of *casting* or *stamping*, but may now and then require some length of *time* for the production of it, as in the case of *modelling* or *sculpture*.

Here then we see the difference between the *antient* and the *modern* contrivance for nullifying *checks*, and producing *acceptable verdicts*. In the *antient* mode it was necessary that, in the instance of each juryman, the disposition to obsequiousness should be ready formed: on the other hand, wherever this condition could be and was fulfilled, the business was the work but of an instant, nor was any application of influence necessary to the accomplishment of it: in the *modern* mode it is *not* necessary, that the disposition to obsequiousness should, in the first instance, be already, as in the *antient* mode, completely formed; nor even that, at that period, it should, in any degree, have existence: but what *is* necessary is, on the part of the situa-

* *Corollary.* In the same manner, and with the same mixt-mathematical certainty, the required degree of obsequiousness may be generated, in the bosoms of persons in any number, in whatsoever other situations placed, and by whatsoever other names denominated: *e.r. gr.* Commons, Lords; Members of a Conservative, Legislative, or any other sort of Senate

tion in question, a considerable degree of *permanence:* understand always *eventual* and defeasible permanence.

The two modes stand thus distinguished by the two different principles, on which their efficiency respectively depends: the *antient* mode, by the principle of *choice*—of *selection*—or, to call it by its established and proper name, the principle of *package*—*simple package*—package *toties quoties*, and without need of *permanence:*—the *modern* mode, by the principle of *permanence:*—thence package, once for all, and with the benefit of permanence.

In the last preceding chapter mention was made of the principle of *mutation*, or continual *change* of persons, as one of the expedients employed in the original constitution of juries, for enabling them to act with effect in the character in which they were destined to act, *viz.* that of a check upon the power of the judge; and, in that view, for securing them against any *sinister influence* by which the *efficiency* of the check, so to be applied, might come to be *impaired.* The principle, here mentioned, under the name of the principle of *permanence*, consists exactly, we see, in the absence or removal of that tutelary and fundamental principle.

The principle of *permanence* being thus palpably opposite to one of the essential and acknowledged principles of *Jury trial*, to have established it *directly* and *avowedly* would have been plainly impracticable. For each court, for instance, a determinate number of jurymen, consisting of the number (twelve) necessary to compose a jury, with or without a few supernumeraries, added for provision against accidents—to each juryman his situation, whether by salary or fees, rendered a desirable one—he, at the same time, pronounced removeable—avowedly removeable—at the pleasure of the judge or some other dependent of the crown;—on any such plan, even in the most uninformed and incurious age, the continuing to the institution the name of *jury* would scarcely have sufficed to reconcile men to an arrangement so palpably perverse—thus destructive of its manifest and manifestly intended nature.

When a determination to subvert, as far as it might be found practicable and convenient, this part of the constitution had been taken, whatsoever were the contrivance employed, it was seen to be altogether necessary there should be some disguise or other put upon it. The business was neither to be attempted *openly*, nor *all at once.*

Four distinguishable conditions were seen to be necessary:—1. Power of *nomination* virtually in the hands of the *Judge*:—2. *Emolument*, sufficient in *magnitude*, and thence in *ordinary duration*, to render the situation an *agreeable* one, and thence the *loss* of it an object of *apprehension*:—3. Power of *amotion*, *viz*. of removing a man from that situation, also virtually in the hands of the Judge:—4. In each case, the design so enveloped, as not to be seen through. All these points were accordingly accomplished.

One point more required to be attended to. To have attempted to apply any such plan of deceit to all cases, and all at once, would have been incompatible with the success of it:—for, the *effect* being produced in every instance, the *efficient principles* would have burst through the disguise.

Applied to all cases in which it was likely that the Judge, or any of the servants of the crown, his confederates, would have any special interest, it would be sufficient to their purpose. To the object thus limited, the plan was accordingly confined: and thus far it has been accordingly found to be but too practicable to carry the design into effect, and without prejudice to the *disguise*.

Of all these several *desiderata*, the accomplishment will now be brought to view, as having been effected in and by the constitution of the sort of body, termed a *Special Jury*: but, for the purpose of this exhibition, a separate chapter will be requisite.

Compared with that mode, in which the principle employed is no other than that of *simple package*, nobody, it is supposed, can be at a loss to see how prodigious the advantage is which is gained by calling in the principle of *permanence*. In the way of simple package, *extempore* package, every thing requires to be done afresh each time: each time you have to hunt out for your men: and whereabouts are you, if so it be that at the moment none that will suit you are to be found?

Apply the principle of permanence, there they are—your men—always at hand: and the longer you have had them where they are, the surer of them, on each occasion, you may be.

Juries, packed in the *old* mode, are like *wood-pigeons* for which the *woods* must be hunted ere they be in a state of requisition for the cook—or like those *wild horses* which a *Spanish Creole* has to scamper after in the *plains* ere he is in readiness to take his ride. Juries packed in what will

be seen to be the *new* mode, packed with the advantage of the principle of *permanence*, are like pigeons taken out of a *dove-house*, or like those well-broken *geldings* which an Englishman keeps in his stable.

In *Juries*, in a word, *permanence* is exactly what it is in armies: it is the work of the same policy in both cases. It was, when as yet there were no *standing armies*, that the coarse and precarious operation of extempore package, *packing* without the aid of *permanence*, was employed in the case of juries. As our *armies* acquired their *stability*, so did our *Juries*: and now that, under the pressure of national necessity, our armies, strengthened by that principle, have swelled to so unexampled a magnitude; now it is, as will be seen, that without any such necessity, without any other more cogent cause than *convenience*, numbers in Juries not being susceptible of increase, this part of the establishment has received its improvement, and that to the degree of perfection that will be seen in the shape of *permanence*: say *permanence*, but never without remembering the encreased facilities it affords for *package*.

Convenience, and nothing more. But what more was needful? For it was the convenience, as we shall see, of *Great Characters*, in those *High Situations*, in which, in the *convenience of the individual*, there is apt to be more of *cogency* than in the *necessity of nations*.

At the outset, packing having been practised, when as yet there was in juries no such thing as *permanence*, the principle of *package* came unavoidably to be spoken of antecedently, and thus far in contradistinction to the principle of *permanence*. But now, at this stage of the inquiry, it will be sufficiently apparent (it is hoped) that of these two principles one is included in the other: and that, by the principle of *permanence* as applied to juries, is to be understood *permanence* and *package together*: package with the benefit of permanence, and permanence for the purpose of package.

§ 4. *Deception—Modes of applying it—Instruments for the Application of it.*

CORRUPTION being the instrument principally employed on the occasion which gave rise to this little treatise, *deception*, an instrument not more in use on this occasion than on

any other; and the part here played by it no more than a subordinate one—a very slight mention of it will be sufficient here. Not that the mention of it will even here be altogether out of place, corruption having among its effects that of disposing a man not only to deceive others, but, moreover in the first place, and for the better quieting of his own conscience, to deceive himself.

On the present occasion, so far as deception is concerned, the problem stands thus:—In cases where, if the conception entertained of the case by the jury were adequate, *viz. complete* and *correct*, their *will*, as declared by their *verdict*, would be more or less apt to run counter to the *will* of the *judge*, so to order matters, as that by means of some want of *completeness* or *correctness*, *viz.* on the part of the conception entertained by them of that case, it may happen to their will to coincide with that of the judge.

There are two ways, in either of which an effect thus desirable may be brought about.

One is, by causing them to have a will, and that will exactly the same with that of the judge.

The other is, by causing them not to have a will, *viz.* of their own forming: of which state of mind the necessary consequence will be their *adopting*, without more ado, whatsoever *will* may come to be presented to them for that purpose by the judge.

Of these two modes, this latter mode is by far the most advantageous one. To the success of the former the creative or special. it is necessary that fresh labour should be bestowed upon the subject on the occasion of every cause: by the other, the preventive or general mode, the business is done once for all; and, without any fresh expence in the article of labour, a perpetually renewed harvest of success is reaped on the occasion of each individual cause: in the one case the business is carried on in the retail, in the other in the wholesale line.

In the case of corruption, the will of the party corrupted—here the jury, being formed by the will of the party by whom or for whose benefit the matter of corruption is applied; the state of the intellectual faculty is immaterial, nor is any sort of debility in it necessary to the production of the effect here supposed to be desired.

But where, in a question of fact or law, a will of his own is to be formed by a man, who having no natural interest

at all in the business, has no interest at all in it, unless by means of corruption he has a factitious one, he cannot have a will, other than one to the formation of which the use of the understanding is necessary: and thus it is, that, if so it be that his own understanding is not, with relation to the matter in hand, in a state fit for use, that is, capable of being applied to use, he is not only content but glad to borrow one of the judge, whose care it is that, under the *cover* of an act of the understanding, a *will* of his own, more or less nicely folded up, shall be enclosed.

By the understanding of a person placed in the situation of judge, an influence will of course be exercised over the understanding of every person standing in any such situation as that of juryman: and this influence, being on all occasions applicable to all purposes good and bad, is thereby applicable to all bad ones.

On this occasion the part which is open for *deception* to act is the giving to this influence a degree of strength beyond what properly belongs to it—such a degree of strength as will enable it, upon occasion, on the spur of sinister interest or passion, to act with advantage in a direction opposite to that of the *dictates of justice.*

In another work, (*Scotch Reform*, Letter 1,) it has already been shewn how completely opposite the *interest* of all *judges*, commonly called by that name, as well as of all other men of law, has, throughout their whole field of action, all along been, and still continues to be, to the *duty* of judges, which is as much as to say to the *interest* of the *people* in respect of the ends of justice: not only this fact, but the cause of it, *viz.* an ill chosen mode of remuneration, has in that same work been already brought to view. Of this opposition the cause and influence having as yet in a very small, if in any degree been understood, the whole course of action of these functionaries has consequently been a course of deception: of deception practised throughout that whole course of action, on all sorts of occasions, and upon all sorts of persons: upon individuals at large, in their character of *suitors*: upon jurors, in particular, in their character of jurors.

Of the two modes of deception, *special* and *general*, the general has already been shewn to be in every respect by far the most convenient with reference to the present purpose. The general consists in forcing the people with whom

you have to do, to borrow your *understanding*, and, under the cover of it, your *will*, by preventing them from having any *understanding* fit for use, and thence from having any *will* applicable to the purpose.

On this occasion the system of deception divides itself into two branches—the first consists in rendering the subject—whatever it be, law, religion, any thing—in the present instance law, as incomprehensible,* or (what is the perfection of incomprehensibility) as uncognoscible as possible to all whom you have to deal with, and that to their own conviction and satisfaction.

The other consists in doing whatsoever the nature of the case admits of, towards raising in their minds, to as high a pitch as possible, the estimate formed by them respectively of the correctness and completeness of the knowledge possessed by yourself in relation to the same subject.

To the first end contribute, jargon, nonsense, absurdity, surplusage, needless complication, falsehood—every kind of intellectual nuisance, in every imaginable form: and this the higher in degree and greater in quantity the better, without any other restriction than what may be imposed by whatever caution may be necessary to enable you to avoid counteracting the other object last above-mentioned.

Of these two branches of the art of deception, the first mentioned may be termed the *depressive* or *humiliative;* the other the *self-exaltative*.

The instruments applying or applicable to the purpose of deception, as above distinguished, may be the more readily comprehended by being distinguished into two classes. Those of the one may be termed the incorporeal instruments of deception: and though, upon a principle of division and nomenclature already attached to the subject, a complete enumeration of them would perhaps be scarce practicable, a tolerably sufficient sample of them has just been given; *viz.* in the words *jargon*, *nonsense*, *absurdity*, and so forth.

For the designation of the instruments of the other class of these instruments, the term *corporeal* will of course present itself to the mind of every man who has read Blackstone.

Under the class of corporeal instruments may be comprehended, besides the *posts* or other *uprights* by which the level of the *bench* is elevated above that of the *jury-box*, the peculiar *habiliments* by which the profession and the

office together stand distinguished: outward and visible signs of the inward and invisible graces and virtues, intellectual and moral, that dwell within. These last, in consideration of the incalculable influence which they are found to exert on the understanding of jurors and others, through the medium of the imagination, may be moreover termed instruments of *fascination:* and as, among heathen statuaries, the circumstance of a man's having officiated with his own hands in the character of his own godmaker was not found to diminish his devotion towards such his God, so if, among the inhabitants of the same jury-box, it should happen to the makers of the several instruments of fascination, *viz.* the furrier, the taylor, and the peruke-maker, to find themselves assembled and met together, there seems no reason to suppose that, upon the minds of these several manufacturers, the influence of the several articles, in the character of instruments of fascination, would be less efficient than upon those of the other " good men and true," their colleagues.

Of these corporeal instruments the importance is the greater, inasmuch as but for them, and the fascination produced by them, it seems not altogether easy to conceive, how the first branch of the art should have been compatible with the second, and how the stock of jargon, nonsense, absurdity, and so forth, how abundant soever, should have been conducive to, or even compatible with, the design of raising, in the minds of the persons concerned, the idea of the stock of real knowledge possessed by those exalted characters by whom these incorporeal instruments of deception have ever been so liberally employed.

Both sorts of instruments, incorporeal as well as corporeal, may moreover, if not in a strictly legal sense, as savouring rather of the personalty than the realty, yet at any rate to a common intent, be stiled and intitled hereditaments.

In relation to the corporeal hereditaments, the instruments of fascination, two things ought, notwithstanding, to be observed—one is, that the fascination performed is performed by the intrinsic and independent virtue of the instruments themselves, and that to the bearer, nothing being on his part performed, or necessary to be performed, towards and in relation to the effect, no part of the effect ought to be ascribed or imputed: the other is, that were it not for the evil company they are connected with, *viz.* that of the incorporeal instruments above-men-

tioned, and the evil purposes to which the whole company are so unhappily apt to be applied, the influence of these corporeal instruments, notwithstanding the name of *fascination* so incontestibly belonging to it, might well be salutary and beneficial upon the whole. It is only by the abuse, in so far as abuse is made of them, that they operate in the character of instruments of deception—the character in which they belong to the present purpose: and if these corporeal were separated from the incorporeal instruments and hereditaments above-mentioned, *viz.* the jargon, nonsense, and so forth, the *abuse* of the corporeal ones would be separated from the use.

Of these several instruments of influence to whatsoever purpose applied, that of deception or any other, the efficiency in that character will (it may be said) naturally be the same—nearly if not exactly the same, whether, in the constitution of the jury in question, the principle of permanence be or be not employed.

This may be admitted. One means of influence however there remains, coming under the head of influence of understanding on understanding, which is applicable with peculiar advantage to the purpose of deception, and which requires, as a necessary condition to its application, the application of the principle of permanence.

When the judge and the jurymen become acquainted with each others persons, being in a state of habitual intercourse, a sort of connection, though it be but in the way of sympathy, grows up between them: a friendship which, though it be of that kind which has been called a *friendship of inequality*, a friendship betwixt the superior and the inferior, betwixt wisdom and simplicity, is not to this purpose at least the less powerful and effective. A look of complacency indicative of old acquaintance and mutual good understanding, descending, if ever the dignity of the judge finds itself reduced to descend to such benignity, from the heights of the bench upon the leading man in the jury box, the bellwether is gained, the flock follow of course. A sort of compact forms itself, under and in virtue of which the man of learning engages to afford direction, the child of simplicity to follow it: this compact once formed, the presumption, which on any particular occasion should presume to think and act for itself, would be an act not only of temerity, but of revolt and perfidy.

CHAP. IV. SPECIAL JURIES, A SPECIAL ENGINE OF CORRUPTION.

§ 1. *The System briefly stated.*

WE have seen what expedients the nature of the case affords, for moulding juries into *obsequiousness*, principally by means of *corruption;* and thus divesting, as much as may be, of all *reality*, the *appearance* which they exhibit of a check to the arbitrary power of the judge.

We now come to speak of the *instrument* or *engine*, contrived for that purpose; applied to it, and to this day continuing to be applied to it, and with what disastrous success will be seen as we advance. This engine, in no small degree a complicated one, is no other than the sort of jury termed a *special jury*.

A *special jury* is so termed to distinguish it from a *common jury:* this last name being reserved for the designation of the only sort of jury, which, till the invention of this special instrument of corruption, was in existence.

Above has been brought to view, in the character of a *possible* one, an arrangement, by means of which (bating such rare and casual exceptions as are liable to be now and then produced by the irregularities of the human mind) a body of men, be they who they may, may be brought into a state of constant and complete *obsequiousness* to the will of some person or persons, (in the present instance the judge) between whom and them the requisite sort of relation has, in the manner there indicated, been established. In the case of a *special jury*, this *possible* arrangement will be found to have been, and to remain to this day, completely *realized*.

As of the *true* and *original* jury, so of this *impostrous modern* substitute, the *origin* lies buried in obscurity. *Human craft* in every shape, and, in particular, in the shape of *lawyer-craft*—human-craft, like the *mole*, hides its ways from the light of day, and, as completely as possible, from human eyes.

The clearest view, as far as it goes, that we possess of this sort of jury, is that which is afforded to us by the *statute-book:* and, in the statute-book, antecedently to the year 1730, being the third year of the last reign, no mention of it is to be found. In a statute passed in that year (3 Geo. 2. c. 25.) the sort of jury in question is spoken of, in the way of reference, as a

sort of tribunal actually in use:—finding it already in existence, all that the statute does with it is to *regulate it.*

In the way of *amendment,* this act was, in the course of the same reign, followed by four others or parts of others: *viz.* 4 Geo. 2. c. 7; 6 Geo. 2. c. 37. making perpetual 3 Geo. 2. c. 25; 24 Geo. 2. c. 18; 29 Geo. 2. c. 19.*

In each judicatory (*viz.* in each of the three Westminster-hall jury-trial courts, King's Bench, Common Pleas, and Exchequer,) in the hands of an officer of the court, the right-hand man and dependent of the Chief Judge,† this cluster of acts (to consider them together) found the effective nomination of these assessors, by whose power that of the judge was in *appearance* to continue checked. Such are the hands in which King, Lords, and Commons found the faculty of reducing to a shadow the controul supposed to be exercised by a jury: and in the same hands, under the direction of their learned and essentially treacherous guides, in these same hands it has been left.

In the hands of the *agents of the parties,* in *crown* causes, the solicitor of the crown, acting under the direction of

* The oldest *book of practice* (such is the denomination used, among lawyers, to denote the books, in which a statement is given, of the operations and instruments in use, in the different judicatories, in the course of judicial procedure)—the oldest book of practice, of which any mention is to be found in the Law catalogues, is *Powell's Attorney's Academy,* London, 1623.

In that book, no such appellation occurs as that of a *special jury,* p. 141. *Eightpence* a head being stated as the fee allowed to the jurors at *Nisi Prius,* in Guildhall, London; *fourpence* a head is stated as the fee given to those to whom, in case of a deficiency in the number of regular jurors returned in the writ called the *Habeas Corpora Juratorum,* it happens to be *added* to them, in the character of *Tales-men:* at length *tales de circumstantibus.*

At present, the denomination of *Tales-men* is applied to such *common jurors,* as are employed to fill up casual deficiences in the number of *special jurors:* but, *at that time,* they were but so many men taken (as their name imports) from the *by-standers,* to fill up the like deficiencies in the number of *common jurors.* On this occasion mention may be seen made of an important office, *viz.* that of "*my Lord's Foot-Cloth Servant:*" who of course would not be left unprovided with his fee. And what would any one imagine was that fee? Answer—Half as much again as that of a *regular* juryman; thrice as much as that of a *tales-man.* For the purpose of tracing out the first mention made of special juries, it would be matter of curiosity at least, to examine the intermediate books of practice between 1623 and 1730.

† [*Right-hand man of the judge*] In the *King's Bench* two *Masters:* one on the *crown* side, the other on the *civil* side: in the *Common Pleas,* two *Prothonotaries.* in one branch of the *Exchequer,* a *Deputy Remembrancer:* in another, a *Deputy Clerk of the Pleas,* called also the *Master.*

For, in the judicial chaos, as all manner of different things go by the same name, so does the same thing go by all manner of different names.

other servants of the crown his superiors, they found the faculty, and the practice, of giving to each special juryman a fee, to an amount altogether *unlimited:* whether it was or was not in their practice, or in their power, to keep back the fee, till after he had earnt it to their satisfaction, does not appear.

In one of these acts, (24 Geo. 2. c. 18. sec. 2.) reciting that "complaints are frequently made of the great and ex-" travagant fees paid to jurymen under the authority of the "said recited acts," parliament did indeed attempt to limit this fee, *viz.* to the sum of a guinea: but with how little success may in due season be observed. (Part iii. ch. 2.) This guinea, however, was not merely a guinea for *each day* of service, but a guinea for *each cause* tried in the compass of that day: and to the number of such causes there was no certain limit: nor therefore to the number of daily guineas.*

§ 2. *The Corruption briefly indicated.*

SUCH, so far as could be exhibited by a rough outline, and upon a small scale, *was* and *is* the actual state of practice. Now, in respect of such matters as *influence, corruption,* and *obsequiousness,* let us, upon the same scale, observe the fruits and *consequences.*

By means of the *magnitude* of the *fee,* and the *situation* of the *hands,* on which, on the occasion of *each individual cause,* it was thus made to depend by what individuals this mass of emolument should be received, a *regular corps* had thus gradually and secretly been established, the members *nominated* in all cases by the dependent of the judge, that is in effect by the judge himself—paid in private causes by individuals, but in *crown* causes by the *servants of the crown:* a body of troops, taking its orders, in *private* causes, from the *judge alone,* in *crown causes,* also immediately from the judge, but in effect from the *judge* and the *other servants of the crown* in conjunction, according to any agreement which in each instance it happened to them to have made. And thus it is that, in a Westminster-hall court, in a crown cause, including almost all causes in which the members of govern-

* [*Daily Guineas.*] Times newspaper, 16th Dec. 1800. "Yesterday morning, "in the Court of King's Bench, Guildhall, *eight* causes for *special* juries ap- "peared in the list for trial. They were all referred: in one only a verdict was "taken, *pro formâ,* for the plaintiff." *See Scotch Reform, Letter* 4, p. 77.

ment, as such, are liable to take any real interest—the fate of the defendant rests altogether in the hands of the dependent set of jurors thus picked out from the rest. So much as to the *fact* of the dependence: now as to the *degree*. Of the occupier of any lucrative situation; of the placeman who, by any formal notification, is liable to be at any time removed from his situation—removed by an officer, who himself is liable, in the same manner, to be dismissed by the king or any of his servants, the dependence is commonly considered as standing at the *highest* point in the scale of strict and perfect discipline. But a point still *higher* is occupied by the sort of dependence which, in the manner we have seen, has place in the case of a *special juryman*. For, by the formality of express dismission, the attention of the public mind is naturally, with a degree of force depending on existing circumstances, pointed to the incident; and in some cases, disapprobation from that quarter is in a greater or less degree liable to be incurred: but, in the case of a special juryman, let drop out of the list for lack of obsequiousness, the right hand of the official agent of corruption scarce knows the deed, the negative deed, thus committed by his left.

§ 3. *The System further developed.*

SUCH is the general result. By a few explanations the conception obtainable of this mystery of iniquity may be rendered more distinct and particular, though to any practical purpose, the proof need scarcely, nor perhaps can it, be rendered more conclusive.

The choice made, as above, by the immediate instrument of the judge, is not absolutely without its limits; but, by the limits which it finds, no bar whatsoever, it will be seen, is opposed to such a choice as can ever fail to be fully adequate to every desirable purpose.

1. In the first place, forming the basis of all subsequent operations, comes what may be termed *The qualified list*.

On the foot of the primæval practice, settled before the distinction between *common* and *special* jurymen was devised, the members of the list which served as the general fund out of which jurymen were drawn for the purpose of each cause, were, and are, in each township, named by the *constable* of the township, on the supposition of their being

possessed of certain pecuniary and other qualifications, fixed upon by law. By the sheriff of the county these *elementary* lists were, and are, collected into one aggregate, which, as above, may be termed the *qualified list:—the common and special jury qualified list.*

2. By the same hand, out of this list a *selection* is made of such persons as, under the clauses in the acts relative to *special juries*, are regarded as being provided with the *special qualifications* appointed by these acts. The minor and included list, thus formed, may be termed *the special jury qualified list.* The persons thus distinguised from their fellows, and by the distinction qualified for being, in the character of *special jurymen*, employed by the *master*, the judicial officer above-mentioned, are, in the constable's books, designated by the title of *Esquire.**

3. Among the members of this *special jury qualified list*, persons whose *names* are lying constantly before him, and with whose *characters*, their number being so much smaller (I speak of those for Middlesex, about 400)† he is at least as well acquainted as the Chancellor of the Exchequer with those of the members of the House of Commons, this right-hand man of the judge,‡ this *Master*, this *Master Packer*, as

* Phillips, p. 153, 160.

† Ibid.

‡ In *Edmunds's Solicitor's Guide* to the Practice of the *Office of Pleas* in the *Exchequer*, London 1794, are divers *Bills of Costs;* in one of which the case of a *Special Jury* is introduced. In this part of the bill (p. 119) one of the items runs thus:—"*Paid the Master*," (the familiar name here given to the officer whose proper official title (See 27 Finance Report, p 210) is *Deputy Clerk of the Pleas*)—"Paid the Master, on *naming* the 48 special jurors, 2*l.* 2*s.*" Another runs thus:—"Attending and *inquiring into the connections, &c.* of the 48 jurors, 6*s.* 8*d.*" These 48 are the 48 nominated by the *Master Packer*, and composing, as above explained, the *gross occasional list*, from which the deductions of 12, by the agents of the parties on each side, are allowed to be made. But *of whom* should the *inquiry* be made but of the *master packer*, who is thus *attended?* For it is at *his* office that the several *attendances* charged in this part of the bill are, every one of them, paid: and *to what purpose* make the inquiry, if the official person of whom it is made were not, by his *acquaintance* with the "*connections*," &c. of these jurors, in a condition to answer it? Possessed of this knowledge, and therefore capable of giving the benefit of it to all such persons, in "high situation," to whom it may be agreeable to produce a proper title to it? In "high situation," such, for example, as the constellation of luminaries, for the barking at whom Mr. Cobbett and Mr. Justice Johnson were prosecuted and convicted. See further on chap. 8.—*Note*, that, in this *Bill of Costs*, the cause is supposed to be a *country* cause. yet, for learning the "*connections*," &c. of the jurors, it is not in the *country*, where their residence is, but *in town*, viz. at this *packing office*, that "*the inquiry*" is stated as being made.

If the office be thus capable of serving as an intelligence office in the case of

he may be termed, chooses on the *occasion*, and for the purpose of each cause, 48.* Of these 48, the list may be distinguished by the name of *the gross occasional list.*

4. From this *gross occasional list*, the agent of the party or parties on each side of the cause, has the power of discarding 12: which faculty, (the agent having of course his fees for it) will, in the natural order of things, of course be exercised.† But if, to this natural order of things so, on any occasion, it should happen, that an exception should take place, then, and in such case, it is by the *master packer* that the defect is supplied, and the operation of discarding performed.

5. Be this as it may, of the remaining 24 is constituted what may be termed *the reduced list.*

Of each of these 24 the attendance is, or at least ought to be, required by the sheriff by a *summons*, issued in obedience to an *order* or *precept*, which contains the whole *reduced list*, and has been previously transmitted to him from the court.

6. The number actually *serving* on a jury being no more than 12, the object in view in summoning the 24 is to secure the appearance of half that number. Of those who, on any given occasion, actually make their appearance accordingly, the list may be termed *the actually appearing or attending list.*

7. Be the number *actually appearing* what it may, the 12 whose names stand first upon the *reduced list*, are the 12 that serve. Of these the list may be termed *the serving list.*

If not so many as 12 make their appearance, then so many as do appear being put upon *the serving list*, the rest are taken from among such persons as happen to be in attendance in the character of *common jurors.*‡

country gentlemen, whose residence is in *Cornwall* or in *Cumberland*, how much more complete may not the information be expected to be when the subjects of it are *guinea-men*, all living in, or in the *near vicinity* of, the aggregate metropolis?

* Crompton and Sellon's practice of B. R. (civil side) and C. B. 1. 437. Tidd's practice of B. R. (civil side) p. 725. Impey's practice of B. R. (civil side) p. 239. Hand's practice of B. R. (crown side) 1805, p. 10. Edmunds's practice of the Exchequer (Pleas side) pp. 73—119.

† The solicitor for the treasury having a salary receives, it is supposed, no fees, but, for the exercise of the faculty in question, adequate inducements, in other shapes, do not in that quarter seem very likely to be wanting

‡ These, with reference to the *special jury* in question, are called *tales-men.* But the persons to whom the denomination is on this occasion applied, are very

On the face of this statement, nobody surely can be at a loss to understand how nugatory the power of *discarding*, though allowed to both sides, is, in the character either of a *bar*, or so much as a check, to any sinister choice, which the right-hand man of the judge, the master packer, under all the sinister influence to which, in some cases, his Principal stands exposed, may be disposed to make.

The *whole* 48 being alike at his devotion, alike the creatures of his choice, what matters it to him which of them are the twelve that serve.

8. Of all these several lists, though not as yet distinguished any of them by names, *viz.* neither by the above nor by any others in current use—the existence is neither unknown nor disavowed, nor so much as endeavoured to be concealed.

But another list, the existence of which though it scarcely would be avowed, is not the less real, and to which suspicion has, it will be seen, already fastened a sort of *nickname*, is a list which, in the stile of sober sadness, may be distinguished by the appellation of the *select and secret qualified list.* It is a list, composed of such members of the *gross qualified list*, as by the *grand elector* so often mentioned—the *Talleyrand* of the respective courts—are regarded as sure men: men who, being qualified for dependence, may accordingly be themselves depended upon; and from among whom, upon each occasion, the *gross occasional list*, required for that occasion, may be securely taken without fresh expence of thought.

§ 4. *The Corruption and Dependence developed.*

THESE six* Grand Electors, have they, each of them, a separate list of this kind? or does one such list serve for them in common? The answer is among those mysteries which must, in a great degree, remain involved in their

differently circumstanced from those to whom it was originally applied; *viz.* in the case of the *original* body of jurors before the innovation gave rise to the distinction between *special* and *common* jurors: the *tales-men* of those days were men actually taken from the crowd of casual by-standers; as, when given at length, their Latin denomination, *tales de circumstantibus*, imports.

* Courts *three:* King's Bench and Exchequer, in the former, Grand Electors or Master Packers, *two*: in the latter three. See above, p. 27, note †.

original darkness. What, as will hereafter be seen,* is *certain* is, that in, and for the use of, *the Exchequer*, a list of this sort exists;—exists with or without a name: what will appear *probable* is, that if there be not a distinct list of this sort kept in, and for the use of the *King's Bench*, the Exchequer list is occasionally resorted to for King's Bench service.

Of these secretly enlisted, and, though without words of command publicly delivered, not the less perfectly disciplined troops, the *number* is of course not known.

But so well is the *nature* of them known, that it has obtained for them a familiar name: the corps being termed, *the Guinea corps*: the members of it collectively *Guineamen*: and if taken separately this or that one is familiarly spoken of as being *concerned and interested in the Guinea trade*.†

Of the *degree of dependence* in which the situation places a man, no unapt token may be found, in the multitude of the persons whose desire of being placed in it is manifested within a given district in a given length of time.

In 1808, Number of persons, inhabitants of Middlesex, actually upon the qualified list, 1100.‡ Number of those who in part of one year applied to be put upon that list, addressing their application to one of the sheriffs, under the erroneous notion of its being in his power to put them upon it, upwards of 100§—all spoken of by him by the description of "respectable persons"—not to speak of others.¶

* Part II. Chap. 2 and 3.

† [*Guinea trade.*] Of this same *Guinea Corps*, the existence is, by a learned correspondent of the late sheriff Sir Richard Phillips, *viz.* the gentleman whom we shall see presently dating from *Lincoln's Inn*, and in a letter destined for publicity, certified as matter of notoriety: and, though many a fact not true is spoken of as true, yet, that a fact neither notorious nor true should by a man of character be certified as notorious—by a man whose name though not published must have been signed—does not seem to be in the ordinary course of things.

Speaking (p. 175) of "persons who from low situations in life have crept into "a little independence, and by artifice and collusion with the inferior officers, "get their names placed upon the *freeholders' list* with the proper additions. .... I know several (says he) of this description who are ludicrously described as being *deeply concerned and interested in the Guinea trade*." .... Letter, dated from *Lincoln's Inn*, Sept. 1808, to *Sheriff Sir Richard Phillips*, printed in his *Letter to the Livery of London on the Duties of Sheriffs*: London, 1808, 2d Edition, p. 175. See the Letter at length in Part II. Chap. 7. of this work.

‡ Phillips, p. 160.

§ Phillips, p. 173.

¶ [*Speak of others.*] To Sir Richard Phillips, a considerable time before the expiration of his shrievalty "more than a hundred applications," had, as he himself

Two other sources require here to be brought to view, from which the completeness and abjectness of dependence, and the correspondent arbitrariness of the correlative power, are capable of receiving increase: 1. The *facility* and *security*, with which the correspondent power created by such dependence is capable of being exercised: 2. The *number of the persons*, by any one of whom the power in question is, with that same degree of facility, capable of being exercised over the one dependant in question. On both these accounts may be seen, in the instance of the Guinea corps, a degree of *dependence*—in that of their secret rulers a degree of *arbitrary power*—such as it may not be easy to match in any other instance.

Consider, in the first place, the number and quality of the persons, in whom the dependant will be apt to view the arbiters of his fate. *Visible* and *immediate* possessors of this power, two—and two only: these will be, in the first instance, the master packer by whom the *gross occasional list* is formed—and, in a crown case, the crown solicitor by whom the candidate for a place in the *serving list* is liable to be *discarded*.

But these are not, either of them, persons by whom, in case of any sinister interest, the *original* sinister interest will naturally be possessed: it is from other *persons behind the curtain*, persons in quality and number unknown to the continually-employment-seeking and everlastingly-dependent guinea-man, that, in case of any such sinister interest, and corresponding notification of *superior* will, those *ostensible* and *apparent* officers will have taken their direction or their cue. In these unknown occupants of the region situated behind the curtain, the trembling guinea-man will behold so many phantoms, to the *will* of every one of which, so far as it can be guessed at, and to him presents itself as reconcileable with that of the rest, it will be necessary for him to shape his part in the verdict. Among half a dozen of these high-seated spectres, to *five*, for example, the verdict he joins in may, in his conception, be

assures us, p. 173, been received, soliciting to be put upon "what they called the special jury list." All these from persons termed by him "respectable persons:" whether to these were added any other applications, *viz.* from persons to whom that denomination could not, in his judgment, be with propriety applied, is not mentioned.

matter of indifference. No matter: if to the remaining *sixth* it be matter of anxiety, the liberty of the guinea-man is as effectually killed by this single one, as it could have been by all six.

Meantime neither with any of the phantoms behind the curtain, nor with either of the two masses of human flesh subsisting, is it possible for the *guinea-man* ever to come to any sort of explanation. With the right-hand man of the judge it is scarce possible, with the crown solicitor it is neither necessary nor natural, that he should ever have any sort of intercourse. His sin, the joining in a wrong verdict, is committed openly in the jury-box: his punishment—removal out of the *select qualified list*, will be inflicted in secret: yea, and so secret, as not to be at any determinate time made known even to the sinner himself. Offended powers inexorable, were it only because uncognoscible: repentance rendered utterly unavailing by the very nature of the case.*

Think now of the *facility* and *security*, with which the correspondent *power*, created by this sort of dependence, may be, aye, and ever must be, exercised. Say rather, *profited by*, without being *exercised*. To powers that need never make their appearance, neither *action*, no, nor so much as *existence*, is necessary to the production of the most unreserved obedience: existence sufficient to the purpose is lent to them by the dependant's fears. On the part of the invisible potentate, no previous *Mandamus*, no *Lettres de Jussion* are ever necessary: the effect is produced without an atom of responsibility in any such high quarter, in any the slightest shape.

How delightful, yes, even in comparison of what it is at present, would be the situation of a *Chancellor of the Exchequer*, were the corps under *his* command subject to an equally efficient *Mutiny law*, and thence in a state of equally perfect discipline. No need of *letters*, no nor so much as

* Thus, in a political libel Cause, the persons in whom the trembling Guinea-man will behold so many eventually avenging angels, each of them a flaming sword in hand, ready to drive him *out of his paradise*, are not only the *master on the crown side*, the *crown solicitor*, and the *judges* of the court, but, among persons *in high situations*, all those who have been either struck, or struck at, by the instrument thus *vulnerary* to sentimental *feelings*. For a knot of them see the case of the *King against Cobbett*, as reported in Cobbett's Register, 2d June 1804—the grand modern edition of the grand *Star-chamber* case *de libellis famosis*, as hereinafter brought to view.

of hints or winks, suggestive of the *moral duty of resignation.* No *Whitbreads,* no *Madox's* to encounter: no *votes of innocence* to frame after *confessions of guilt:* no previous questions to move, and carry by main force. The thorns that pierce the well-compacted bench he sits upon, would not then be so pungent, but that it might be "*in the power even of money,*" dross as it is (so there were but enough of it) to assuage the smart.

How perfect soever the discipline of this corps, I speak of the *Guinea corps,* may be at present, its existence in any such degree of perfection cannot have been of any very antient date. *Point d'argent, point de Suisse.* Before the situation was capable of being moulded into an instrument of corruption, an efficient cause of sure obsequiousness—it was necessary that a quantity of *saccarine* matter, sufficient for the *dulcification* of it, should have been secreted and combined with it. But, even at present, keen and numerous as we have seen the appetites to be that are excited by that matter, the quantity of it furnished in a year is no greater (I speak always of *Middlesex*) than that which is extracted from 200 causes.

At present, as already observed, the whole of the *gross occasional list* (48) being, on the occasion of each cause, chosen in the first instance by the *master packer,* all taken out of the *select and secret list,* with whose "connections, &c." he is so perfectly well acquainted;—in this *regular* and *well-ordered* state of things, which of them are left to constitute the *reduced list,* (24) of whom the 12 whose names stand first upon the *appearing list* will constitute the *serving list,* will, to him and his high-seated superiors, be, as already observed, matter of complete indifference. But at an early period of the special jury system, no such entire security could have been possessed. Of those with whose *dispositions* he was sufficiently acquainted, they being at the same time such on whom, *if* attending and serving, dependence might be placed, there might not be above a dozen of whose *attendance* he could be sure, and of the whole of this dozen, supposing the right of discarding exercised, he might find himself deprived. In such a state of things, the command of a verdict, even from special jurymen, seems to have been matter of anxiety: and though, when once established, the faculty of *discarding* could not, as it was thought, consistently with prudence, be absolutely

taken away, yet what in this way was thought capable of being done, without a too complete removal of the mask, a too bare-faced act of injustice, was done.

Accordingly, in the 3d of King William, anno 1690, *Holt* being Lord Chief Justice of the *King's Bench*, "a standing *regulation*, if not at that time made, was at any rate found to be in existence:* a regulation whereby it was provided; that unless a *special order* were made for the purpose, giving to the parties on both sides, and consequently to the defendant, that faculty, it should *not* be exercised: but the nomination should be *compleated* as well as *begun*, by the officer of the court, the *subordinate* of the then *removeable* and completely *dependent* judge.†

Thus the *ordinary* course of practice at that time was—*not* to allow any such faculty; and it was only where, having been importuned for, it could not for shame be refused, that it was granted.

Throughout the system of *technical practice*, so universal is the *practice* of *misrepresentation* and *deceit*, that it is matter of continual uncertainty by what hand this or that branch of business is actually performed. Thus, in Equity practice, of the mass of business stated in the books as being performed by the *Master*, an indefinite and ever variable proportion is really performed by some clerk of his, the master knowing nothing of the matter. In any of these offices, intimate on any occasion a suspicion of any thing not exactly correct, whether in the article of *probity*, *attention*, or *capacity*, your mouth is stopped at once by a reference to the dignity and character of the learned person, whose office is held nominally during good behaviour, virtually for life, and who, attired in such resplendent robes, takes in the Court of Chancery, in Westminster-hall, his periodical seat by the side of the Lord High Chancellor himself: whereas in truth, on the occasion in question, the business

* Salkeld.

† To facilitate conception, the word *regulation* has hitherto been employed, as above: the effect not being readily conceived, unless a tangible cause adequate to the production of it, be conceived along with it. But the plain truth is, there was *no regulation* in the case; in the existing collections at least, nothing of this sort is to be found. Here as elsewhere, there was nothing in the case but what, in *law language*, is called *practice*: that is, a series of *arbitrary acts*, from which every man is left to frame his own conception of *a law*, viz. such a law as, *had* it had existence, would, in his conception, have formed a sufficient warrant for those acts, but which, in reality, had *no* existence.

was performed, the *power* exercised, a *power* over the property of suitors to any amount in point of importance, exercised—not by this learned person, but by some underling who is known to nobody, whose name appears no where, and who being *there* to day, may be gone to-morrow.

Thus in the case of the jury-packing business. In every of the five packing offices but one, the person by whom the business is done is, in the several books of practice above referred to, gravely stated as being *the master:* and, in each of those four instances, so it may be or may not be. But in *one* of them, *viz.* in the *King's Bench office, crown side,* of the practice of which there was no account till so late as in the year 1805 the public happened to be favoured with one by Mr. *Hands,* the packing business, it appears, (p. 10) is performed, as it may happen, sometimes by the *master* sometimes by *his clerk.*

This being the case in a *crown* cause, a *libel cause* for example, whosoever it may happen to, to see reason for wishing to make himself master of that useful article of knowledge, which, in the Exchequer, according to Mr. Edmunds, as above, persons concerned are so regularly solicitous to acquire, *viz.* information concerning the "*connections, &c.*" of persons qualified for being special jurors, has his choice of two of these intelligence-offices, one of them *inferior in dignity,* and thence perhaps *superior in obsequiousness and tractability,* to what is likely to be commonly known or imagined.

For, according to Mr. *Hands,* (p. 10) after "the solicitor has got the *master's* appointment on the rule to name the jury" . . . . . . it is "the *master's clerk*" that "extracts, out of the sheriff's book of jurors, the names and additions of forty-eight:" and afterwards, "if either party does not attend the *master's* appointment," it is "the *master or his clerk*" that "strikes out for the absent party."

§ 5. *Aggregate Mischief of the System.*

Of the *mischief* capable of resulting to the country from the application of this engine of sinister influence, the quantity will, of course, depend on the *extent* of which the application of the instrument is susceptible.

Cases of felony excepted, this extent coincides with that

of jury trial: at least with that of jury trial in causes originating in any of the great Westminster-hall courts. On every occasion it rests with either party to have a special jury for asking for.* What is reserved to the court is only to say, and that at a subsequent stage, by which of the parties the *extra expence* shall be borne. Among the causes in which the king is nominally the plaintiff—in those to which the name of *crown causes* is more commonly understood as being confined—I mean those in which the servants of the crown, as such, being substantially prosecutors, having the prosecution under their care—the expence being borne out of the taxes, all causes, it may well be imagined, become *special jury* causes: and among these are King's Bench *libel law* causes, and, in comparison of these, (of which presently) all other *crown causes* will, to the purpose here in question, be seen to be of light importance.

And here then we have not only the possible and probable, but actual extent of sinister influence.

Of the sinister influence of which the institution of special juries is thus the engine, the *local sphere* is indeed confined, perhaps at least in a great degree, within the bounds of *London* and *Middlesex*. But, by causes not necessary to be here particularized, within this sphere are brought, with scarce an exception, all causes that belong to this most important class.

But *this* mischief, though *the principal*, forms but *one* ingredient, in a compound mass of mischief, in which, at least, *four* distinguishable component elements may be reckoned up.

1. First comes the injustice—the base and sordid injustice—out of the common pockets of rich and poor, an allowance given *by* the rich *to* the rich, in compensation for a burthen which, to those to whom the compensation is *given*, is as nothing, but, to those to whom compensation is *refused*, a serious one.†

* Phillips, p. 153. 3 Geo. II. Ch. 25. Sec. 15.

† In 1778, so considerable was the pressure of that vexation and expence, that for a long course of years a species of traffic that had been invented by one of the bailiffs to the sheriff of Middlesex, *viz.* the *sale* of a species of *indulgences*, exempting men from that burthen, had composed a regular branch of his revenue. Having been proceeded against in the way of *attachment*, as for a contempt of the authority of the court, and self-convicted by answers to interrogatories, he was sentenced to pay a fine of 200*l.* and committed to prison,

2. Then comes the *pension* fund—thus secretly formed, and though not altogether without the *formal allowance*, yet as to its nature and application, completely without the *actual cognizance* of parliament.

3. In the third place comes the application of this fund to a purpose undeniably *hostile*, and in its *tendency*—and, if not remedied, in its sure ultimate effect, destructive to the constitution; destroying altogether to the extent of its influence (and under its influence are included, we see, the most important causes) the *check* which the power of the

there to remain till the fine was paid. King *versus* Whitaker, B. R. 12 Feb. 1778. Cowper's Reports, p. 752. Such was the pressure in the *small* county of *Middlesex:* what must it have been, and still be, in the *large* ones?

When the class or rank in society, to which a man belongs, is to a certain degree inferior, his interest has either no claim to any degree of consideration, or, if to any, to none but a proportionably inferior degree of consideration: when his rank in society rises to a certain level, his claim to have his interest taken, to this or that effect, for an object of consideration, rises along with it. Such is the maxim which, from the earliest times down to the present inclusive, has, though seldom very explicitly avowed, been not the less steadily and extensively acted upon and approved.

A collection of the instances, in which this maxim has received its application, would be no uninteresting article; no unfit object, one of these days, for the industry of *a committee*. In the statute book they might be found in deplorable abundance. The present instance may serve for one. Of the *extra aptitude* looked out for, as above, the only *criterion* employed was *extra opulence*. To leave without compensation for this burthen that great mass of qualified persons, who, in comparison, were least able to bear it, was no injustice: to leave without compensation men selected for their extra opulence, distinguished by no other mark than that opulence, and thence by their superior ability to bear the burthen, *would* have been an intolerable injustice. To *common* jurymen accordingly the compensation has never been given: it has been confined to *special* jurors.

Whatsoever may have been the *cause* (for it remains involved in darkness) such had been the liberality which on these occasions had come to exercise itself, that, in the declared opinion of Parliament, it was become necessary to set limits to it. "Whereas great complaints, says the statute, (24 Geo. 2. c. 18. § 2.) "are frequently made of the great and extravagant fees, paid to jurymen, re-"turned under the authority of the said recited Acts." Limits were accordingly set to it by the designation of a fixt sum, *viz. a guinea*, which it should not be lawful to exceed.

So long ago as the year 1623, 8*d.* per cause, the same in town and country, was the fee, (as we have seen) that used to be given to each juryman before the distinction between *special* and *common* had come into existence. How long the fee had stood, at that amount, at that time, does not appear. At that amount it stands at this day in the case of common jurors. Gentlemen and squires found gentlemen and squires to take care of them, as well as judges (See Part 3. [illegible]) to sympathize with them. Farmers, shopkeepers, and master handicrafts found no such friends.

jury *was designed*, and *is supposed*, to apply to the arbitrary power of the judge.

4. Lastly—though, after mention of the preceding abuse, the mention of this last is but an anticlimax, comes the facility which, by the permanence already become notorious, is afforded to the *casual corruptor:* to any individual to whose improbity it may occur to take advantage of the facility thus afforded.

To extinguish this facility, was the declared and principal object of the first of the series of statutes above-mentioned; declared in two places, (3 Geo. 2. c. 25. § 1. § 4.) *Corruption of jurors* is, in the *first* of the two places, spoken of as the notorious *effect: permanence*, the continuance of the same man in that situation, is in the *last* of the two places spoken of as the *cause.**

* Let not any such misconception take place, as that it is among the designs of these pages to present, in any unfavourable point of view, if individually taken, the characters of such persons to whose names it happens to have a place in the numerous list in question: I mean the aggregate list of persons, to the number of about 400, set down in the books as *qualified* to serve as special jurymen in the county of *Middlesex*. Among them the only persons, to whom so much as the shadow of suspicion can attach, are those, if any such there be, whose names have been placed upon the *select qualified list:* and of these the names are necessarily *a secret*—and that not only to the *public at large*, but, in many instances, perhaps, to *themselves*.

Thus much, however, seems scarcely to be open to dispute; *viz.* that this same *select and secret qualified list* is a sort of sink, a county sink, a common sewer, into which whatsoever human matter, if any such there be, " is rotten in the state of Middlesex"—whatsoever human matter, endowed with the requisite pecuniary qualification, is, in the scantiest degree, provided with any such qualifications as those of *probity* and *capacity*, has a natural tendency to gravitate. Far be it from me to *assert*—for, sure I am, it does not happen to myself to *know*, that in that whole list so much as a single person deficient in either of those respects would be to be found: all I mean to say is, that if any such person or persons *do* exist—if, in the whole qualified list any such peccant matter have existence, the *select* and *secret* list, if any such there be, cannot but, of all places, be the properest place to look for it. For in the character of an adequate substitute to all other requisites, stands this one, *viz. obsequiousness:* obsequiousness, *experienced* or *presumable*. But to make proof either of *this*, or of any other, qualification, to no one of them, unless it be the *foreman*, can it ever be necessary, so much as to open his lips: no, nor to give any sign of life, other than an assenting nod. Neither by *improbity* in any shape, so long as it be not to a certain degree notorious, nor by *incapacity*, so long as no *commission* of lunacy has as yet been issued, can any *bar* be opposed to *admission* upon this list: no, nor so much as to the *blameless* discharge of the functions of the office. And hence it is, that the office, such as it is, has become to the degree that has been seen (p. 33, note ¶) even though it be not a sinecure, a natural object of intrigue; nor that above the reach of characters, in every respect, so

§ 6. *Views of the Lawyers who penned the Acts.*

THE confirmation given by the series of statutes, all of them statutes of the last reign, to the use made of special juries, this confirmation, and the prodigious extent to which the practice has in consequence been spread, have been already mentioned.

Of the lawyers with whom this series of statutes originated, or through whose hands it passed, the treacherousness, though in this, any more than in any other, instance, treacherousness of this sort ought not to excite surprize, has not the less claim to notice.

The everlastingly vaunted use, and, if not the sole, at least by far the principal use of juries, was the serving as a check to arbitrary power that otherwise would have been in the hands of judges. But, the mode of appointment considered, in proportion to the extent to which it prevailed, by the substitution of this new-invented to the original species of jury the efficiency of this check was, in the first instance, greatly debilitated, and left exposed to be at any time utterly destroyed. For the healing of the wound thus given to the constitution, nothing whatever was done by these unfaithful trustees and unworthy representatives of the people.

In the hands of the dependant subordinate of the judge, to whose power the function of those his assessors was in pretence designed to operate as a check, these pretended reformers found the nomination of those same assessors:—in those hands they found it, and in those same hands they left it.*

By such practised eyes the *fraud* was by far too palpable to have passed unnoticed. As to the *remedy* nothing could have been more obvious. In a selection made by human judgment, under the influence of human selfishness and improbity, there was in any hands more or less danger:

their worthlessness be not notorious, the most worthless. What more promising instrument can power wish for when placed in weak or wicked hands? To the case of country causes, so much of the mischief of this institution as is confined to the anticonstitutional abuse has comparatively but little application. The great theatre in the metropolis enjoys almost a monopoly of the political libel law causes.

a selection made, in the first instance, by *chance*, corrected afterwards by human judgment, under the influence of *impartiality*, a neutral power, formed by the combination of opposite partialities, there could be no such danger. The expedient was too much in use, and too obvious, to escape notice. Use will be made of it further on in the composition of the proposed remedy.

The extent they found it occupying, (I mean the *special jury* system) was not only bounded but extremely narrow. They rendered it boundless: and, by this new fangled and corruptly constituted tribunal, all causes that are considered as coming under the denomination of *important* ones, have accordingly been swallowed up.

To the party in the wrong, to the *malâ fide* suitor, as often as he sees his advantage in substituting, they gave the power, the indefeasible power, of substituting this unconstitutional tribunal to the old constitutional one; and, amongst others, to the servants of the crown, and to the judges themselves, as often as it should happen to them, to have any malevolent passion to gratify, or any sinister interest to promote, at the expence of justice.

Giving to their new tribunal a character so different from that of the old one, which it has to so great a degree elbowed out—giving to a Board, secretly composed of commissioners, paid, placed, and displaceable by the servants of the crown, the respected and almost sacred name of *Jury*, they thus contrived to transfer, to the counterfeit institution, all that attachment and confidence, so justly possessed by the genuine one which it supplants.

Finally, nor, in the *extent*, as well as *confirmation*, given to this abuse, did they forget, that which Judge and Co. never have forgotten, profit to their own *firm*.*

* The following particulars are taken from Edmunds's Solicitor's Guide to the Office of Pleas in the Court of Exchequer, p. 119, as containing a fuller account than I have found in any book delineative of the practice of any of the other courts. In these particulars, the difference between court and court, if any, cannot be considerable:

1. To "*the Master*," (meaning the *Master Packer*) for packing 2*l.* 2*s.*

N. B. The "*Master*" is the *Deputy Clerk of the Pleas*, called *Master* in current language. The *Deputy*: for, on this side of the court the Principal, the Clerk of the Pleas has no more to do with this or any other part of the business, than the other principal master packer, *the Remembrancer*, has on the other.

From this and other sources, anno 1797, the principal clerk of the Pleas (ap-

CHAP. V. JURY UNANIMITY INCREASES THE CORRUPTION.

§ 1. *The Effect of Corruption how secured by it.*

OF the efficacy of the system of corruption, of which the institution of a special jury is the instrument, our conception would be very inadequate, if the force given to that engine by the obligation of what, in the case of a jury, is called *unanimity*, were not taken into the account.

pointed by the Chancellor of the Exchequer to prevent justice from being sold in that office too cheap) pocketed 318*l.* 12*s.* 6*d.* a year for doing nothing: his Deputy (appointed by the principal) 318*l.* a year, for doing what was done, 27 Finance Report, anno 1798. To a *Barrister* for *pretending* to have moved for a special jury, 10*s.* 6*d.*

N. B. Moved, i. e. applied to the court for a rule, ordering that there shall be a special jury, and by the act of signing his name expressing the assurance of his having made such application whereas, in truth, except the signing of this false certificate, nothing has been done by him, the rule being made out by an officer, fee of course received for it, under the judicatory, without the cognizance of the judicatory, or any one of its members. (See Scotch Reform, Letter 1. Devices.) For their parts, in this operation of obtaining money on false pretences, the *clerk in court*, and the *solicitor*, between them, (the judge where needful lending of course his power) *extract*, (*extort* would not be the proper word, *extortion* being a punishable crime) 4*s.* 10*d.* whereof 2*s.* 8*d.* to the clerk in court, 2*s.* 2*d.* to the solicitor.

The form in which their part of the system of false pretences is expressed is in these words:—" *Drawing a brief, and making a fair copy thereof to move for* " *a special Jury,*" so much:—" *Paid a fee to counsel to move same,*" (true) so much: " *And attending him,*" (true) " *and the court*" (not true) " *for that pur-* " *pose,*" so much.

Paid (says one item) *to the under sheriff's agent, attending with freeholder's book,*—2*l.* 2*s.*—Two guineas to a man for pretending to hold a book! a book consisting of 400 lines, each containing a man's name and abode. Instead of plunder, suppose justice to have been the object, what would have been the course? A paper with the names on it kept hanging up in the office: on any change made in the list, notice of the change, or else a fresh paper, sent by the post. Two guineas per cause, multiplied by 200, the number of special jury causes in a year in this county, (Phillips, p. 159) makes, on this score alone, 420*l.* a year, pocketed by the under sheriff for doing nothing.

* To Judge and Co. (the attorney part of the partnership included) total profit made up in this way appears, upon casting up to be, 7*l.* 8*s.* 8*d.* But this is the *minimum* rate, exclusive of casualties: and, in a *country* cause, the profit of the *country* attorney is *not* included in it; this, over and above the *other* expences, which equally have place whether the jury be a special or common one: and to this account remains to be added as expence to the *individual suitor* in a cause between A. and B., to the *public*, in a political *libel* cause, the *twelve guineas* given, at a guinea a piece, to the special jurors.

But for this feature, for any purpose of corruption, a *majority*, or at least half of the 12, all corrupted, would have been necessary: under and *by virtue* of this feature, one, any one, gained and properly armed, armed with the necessary degree of *patience*, suffices.

If the *mode of forming verdicts* had been the work of calm *reflection*, working by the light of *experience*, in a comparatively *mature* and *enlightened age*, some number, certain of affording a *majority* on one side, *viz.* an *odd* number, would, on this as on other occasions, have been provided; and to the decision of that preponderating number would of course have been given the effect of the conjunct decision of the whole: witness the course taken for securing a decision under the *Grenville Act*.

But the age in which the mode of forming verdicts was settled, being an age of *remote antiquity*, of such high antiquity, that nothing more is known of it, except that it was an age of *gross and cruel barbarism*, the course taken for the adjustment of that operation was different, and, compared with any thing that was ever exhibited in any other nation, no less extraordinary than it was barbarous. The whole body of these assessors, *twelve* in number, being *confined* together in a certain situation, and in that situation subjected to a mode of treatment, under which, unless in time relieved from it, they would, at the end of a more or less protracted course of *torture*, be sure to perish: subjected to this torture, but in the case of this as of other torture, with power to *relieve* themselves from it: in the present instance by declaring, each of them, the fact of his entertaining a certain *persuasion* (the persuasion expressed by their common *verdict*) whether *really* entertained by him or *not*: in this way it was that a joint decision, called a *verdict*, expressed by a predetermined word or form of words, was on each, and every occasion, extorted from the whole twelve. Such, for the declared purpose of securing *truth*, *veracity*, *verè dicta*, for making sure that, on the sort of occasion in question, whatever declarations of opinion came to be made should be true—such was the expedient invented in the 13th or 14th century—such the course which *still* in the *nineteenth* continues to be pursued.

Here then, as often as in the number of *twelve* jurors, any difference of opinion has had place, so often has an act of wilful falsbood, of mendacity, had place:

viz. in the instance of some number, from one to eleven, included in the twelve, if not (as in the case of sinister influence may at any time happen) in the instance of all twelve. For that it is in the nature or power of torture —one and the same torture—as being applied at the same time and place to twelve persons, A, B, C, D, and so forth, to produce a real change of opinion in any one of them—or if it were, to render it more likely, that the opinion of A, should change into that of B, than that of B, into that of A, and so forth—is a proposition which, upon reflection, will not, it is supposed, easily find any person either to sign or so much as seriously to say it: excepting always the case of his being placed under the action of any of those machines for the production of *peace, concord, unanimity,* or *uniformity,* under the pressure of which any thing whatsoever—any one thing as well as any other, is either said or signed.

But though what *never* can happen is, that by a quantity of bodily pain or uneasiness, any real change should be produced in the opinion formed by any human being on a subject that has no natural connection with that pain or uneasiness, yet what may very *easily,* and will *naturally* happen is, that either by the eventual assurance of any given quantity of pleasure, or what comes to the same thing by the assurance of having at command a given quantity of the instruments of pleasure in any shape—or by the eventual apprehension of any given quantity of pain or uneasiness—a disposition may, in a bosom soothed with that assurance, or galled by that apprehension, be produced—a *disposition*—yes, and moreover an effective *determination*— submit to that pain, for a greater length of time than any during which the same pain will be submitted to by a bosom not acted upon in either way as above.

From this state of things follow two practical results—

1. Suppose *no* sinister influence (*viz.* of will over will) to have place, the verdict will always be conformable to the opinion declared by that one of the jurors, in whose bosom the prospect of the uneasiness to which, until the formation of the verdict, they will all be subjected, operates with *least* force—more shortly, by him whose *sensibility* to the torture is *least* acute:—whose power of *endurance* is *greatest.*

2. Suppose any sinister influence to have place—an influence acting on the bosoms of any one or more of them

in the same direction—while no sinister influence has place in the bosoms of any of the rest;—there are two cases, in each of which the efficiency of the sinister influence, and the delivery of a corresponding verdict, will take place of course:—*viz.* if on both sides, the power of endurance (with reference to the torture) be *equal;* or if in the bosom operated on by the sinister influence in question (say the fear of losing the situation at the guinea board) the force of the fear produced by the sinister influence be any thing more than equal to the quantity by which what *would otherwise be* the power of endurance on *that* side falls short of the *actual* power of endurance on the other.

§ 2. *Corruptors, regular or casual—both served by Unanimity.*

TWO sorts of corruptors have above been indicated and distinguished: the *regular* corruptor, judge and Co.; the *casual* corruptor, any *individual*, to whom it may occur to take advantage of the facilities, afforded by the institution of the guinea corps, for securing a verdict favourable to his cause.

In whatsoever *shape*, and from whatsoever *quarter*, the matter of corruption be proposed to be administered, for securing the effect of it, no other contrivance so effectual as this of *unanimity*—forced and mendacious unanimity—could possibly have been devised.

On so simple and easy a condition, as the being prepared to endure, longer than any of his fellows, a degree of bodily inconvenience which no persons so circumstanced were ever known to endure long, it gives to any *one* of these jurors, that chooses thus to purchase it, the power of *all twelve*.

Two different sorts of causes, each with its appropriate judicatory, may serve as examples of the assistance derivable by the two different species of corruptors from this one common source,

1. A *political libel* cause—*sole* judicatory *the King's Bench*—is in a peculiar degree *adapted* to afford exercise, or rather does *of course* and *of itself* afford exercise, to the sure and safe and silent and imperceptible operation of the *regular*

corruptor, or rather corps of corruptors, whose *head quarters* are at the *crown office* belonging to that honourable court.

2. A *smuggling* cause,—*ordinary*, and among the courts of technical procedure in practice, *almost sole* judicatory, the Exchequer—is, under the invitation held out by the permanent establishment of the *Guinea* corps, in a peculiar degree adapted to the finding exercise for the dexterity of the *casual corruptor*.

His *solicitor* (for, when the disposition to corrupt and be corrupted is banished from the Treasury Bench, it will be time enough for a *smuggler* to despair of meeting with it upon the *roll of attornies*) *his solicitor* (the same sort of gentleman who, a few years ago, would have answered to the name of *attorney*) pursuing the instructions given to him as above by Mr. *Solicitor Edmunds*, (p. 119) "*attends*" at one of the *five packing offices* above-mentioned, addresses himself according to circumstances either to the acting *master packer* himself, or to the clerk, who to this purpose officiates occasionally as the master packer's deputy—and, according to instruction, as above, makes his "inquiries into the connections, &c. of the jurors." . . . . . .

Alas! what a round-about course is this I was about attempting to delineate! As if a solicitor in the smuggling line did not know his *duty*.

The duty of an *advocate* is to take fees, and in return for those fees to display to the utmost advantage whatsoever falshoods the *solicitor* has put into his brief: the duty of the *solicitor* is to put into such his brief whatsoever falsehoods promise to be so made use of to the best advantage. It is for this amongst other purposes, *viz.* for giving scope and effect to such falsehoods, that, by a *law* of the *modern Medes and Persians*, suitors stand for ever excluded from the presence of the judge.

In the great system of delinquency, the smugglers branch, as it has its *principals*, *viz.* the smugglers *themselves* who are called by that name, so has it amongst its *accessaries*—its licenced accessaries after the fact—the learned *aiders*, *abettors*, *receivers*, and *comforters*, of the aforesaid smugglers.

In virtue of that *division of labour*, which, by the fortuitous concourse of talents, disposition, and opportunities, has been produced in the Court of Exchequer, besides ad-

vocates of the inferior order, there is always a title-gownsman or two, regularly established, as any body may see, in the *smuggling* line.

Can it be otherwise among solicitors?

In the case of any or each such solicitor, let us then make that supposition, the contrary of which would be alike invidious and unnatural: let us suppose him to know, and knowing, to fulfil, in this behalf, his *duty:* his *duty towards man;* and, of his duty towards man, that more specially imperative branch, which is composed of his *duty towards the smuggler.*

In speaking of the *Master Packer*, and his lists, a list mentioned—as one that he *ought* to have, and having to keep hung up, is (speaking of *special jurors*) the *Gross qualified list;*—as a list which it is natural he should have, but not natural that he should keep hung up, another under the name of the *Select and Secret qualified list*, or to give it its other denomination, the *Guinea corps.*

The solicitor in the smuggling line, can he be said to fulfill his duty as towards each, or any of his clients, if he has not, either in his bureau or in his head, a list of the several members of this corps—as *correct* and *complete* as it is in the power of "*inquiry*" and industry to make it?

If in the whole flock of Guinea-men there be but a single scabby sheep to be found, that one individual sheep is *his man:*—under the *unanimity* system, that one individual secures the verdict.

As to the *arguments* by which he, whose *duty* it is to *offer* the bribe, satisfies the conscience of the habitually obsequious guinea-man of its being his duty to accept it, any attempt to display them in detail would be alike superfluous and irrelevant. *Necessity of smuggling—impossibility of carrying on trade without it—informers, perjurers—never believe one of them—prosecution is persecution. . . .*

Is it for any such purpose as that of biassing a gentleman's judgment, *that the little compliment—the small retribution for his trouble—is ready to be presented? Good heavens! no!—it is only to engage his attention—his strict and* unbiassed *attention—of which his detection of the system of perjury, which it is* known *will be brought forward, will be the certain consequence. . . . .*

But to what purpose go on encumbering the section any further with any the slightest hints? Our solicitor has heard with due attention the speeches delivered from *learned silk:*

he has read *debates* in newspapers:—poorly qualified indeed must he be for the exercise of this part of his duty, if on the occasion of any such diplomacy he ever finds himself at a loss. Come the worst to the worst, he can but go up to the guinea-man, with his piece of paper in his hand, and in a tone of blunt frankness speak out and say—*look here, Sir! look at this five hundred pound; this very note shall be yours, the very day a verdict of Not Guilty is pronounced.—Good Sir! you need not stare so: it is but* corruption, *make the worst of it: and it's all for the good of trade. In short, Sir, without corruption, no government can be carried on: it's a known fact, agreed to on both sides of the House. And if government can't, I should be glad to know, Sir, how can trade?*

Well, Sir, we won't differ about names: if corruption *is not to your taste, let us say* influence:—and pray, Sir, were's the difference?

But, in one and the same cause, suppose the *regular* corruptor on *one* side, and the *casual* corruptor on the other:—in a case of this sort, how will the matter be settled?

Fret not thyself about any such case: it is a case that can never happen: nor, if it were to happen, would there be any difficulty in it.

In the *libel line* it can never happen: for, as *every man* that either *writes* or *reads* is by law a *libeller*, there is no such a person as a *solicitor* specially established in the *libel* line. The regular corruptor—or rather the phantom of the regular corruptor—for, (as we have seen) the phantom is quite sufficient—this regular phantom, having here no competitor, walks over the course.

In the *smuggling line*, it can almost as little happen. The *solicitor* for the smuggler is *solicitous* for the smuggler, *because*, and *in so far as*, in being solicitous for his *client*, he is solicitous for *himself*. Here then we have the *casual* corruptor. The solicitor for the *crown* is *not solicitous* for what is called the *crown*: his solicitude, if he has any, is more likely to be for the smuggler: because the more of them escape a first time, the more there are that remain to be prosecuted a second time; and whether the smuggler be caught or escape, the solicitor remains solicitor as before.

Here then, provided the fee be *handsome* enough (for *proportions*, it will be seen, must not be forgotten)—here it is the *casual* corruptor that walks over the course: as to the

regular corruptor, every where but a *phantom*, he is *here* a phantom by much too weak to oppose to flesh and blood any effectual resistance. In the *Exchequer*, he is but a *pigmy:* it is in the *King's Bench* only, and there in the field of *libel law* only, that he *is*, as he will presently be seen to be, a *Giant.*

But *suppose*, be it possible or no, a *real* competition: a solicitous *casual* corruptor on one side, a solicitous *regular* corruptor on the other: how (it may be asked) would matters be settled in this case?

In the *Guinea* trade, as in any *other* trade, they would be settled *upon the principles of trade.* Compliment offered, so much down. *Per contrà*, on *taking stock*, situation in the Guinea trade, gross value, so much: situation not being insurable, either at the *Equitable* or the *Amicable*, say loss of value, by peril of false brethren, and shipwreck, in case of *non-obsequiousness*, so much: balance, *for* or *against* accepting compliment, so much.

But at this rate (says somebody) *we should have* bought acquittals, *especially* in smuggling causes, *as plenty as* sham pleas *or* sham bail—*and of any such degree of frequency, or any thing approaching to it, are any indications to be found?*

Have patience:—things must have time to ripen. It is only within these *few* years, and under the *auspices* of the *present* learned Chief, that the system has been raised to that height in the scale of perfection, at which it will presently be seen to stand. Earth must have *time* to bring forth her increase: especially in such a field as that of *judicature*, where if, of those things which yield profit to the husbandman, the growth of every thing is sure, yet even of those things the growth of almost every thing is slow.

True it is, that, after fighting off till *judgment*, the *swindler*, with another man's money in his pocket, goes to *eight* of the *twelve Judges* in the *Exchequer Chamber*, or to *four* of them in the *King's Bench*, as the case may be, and says to them, (they *appearing* in the only mode of *appearance* which they admit of, *viz.* by this or that *agent* of theirs.) *The delay you have upon sale is cut out, I find, in pieces much of a length, let me have one of the longest: make out your account: I know you deal for nothing but ready money: here it is for you.* Here we see *perfection*—the very summit of the scale.

Expect not however that at the Guinea office, even at that which is under the Exchequer, business of this sort

should, at so early a period of the institution, be already to be transacted upon any such pleasant and easy terms, as with the old established *firm*, Judge and Co., the business of which has for so many hundred years been conducted upon the *true* principles of trade.

Expect not therefore to find *already* established, by the side of each *delay-shop*, a *verdict-shop*, at which, addressing himself to a clerk of the *Guinea Board*, with as much frankness as if in an Error-office it were a solicitor to a swindler addressing himself to the *clerk of the Errors*, a solicitor in the smuggling line may say—*The King against such an one—I am for the defendant: secure me a verdict! penalty, so much: 5 per cent. upon that sum, so much: here it is for you.*

No:—to the prosperity of this branch of the trade, one limit there is, which is set by the very nature of the trade.

The *regular* corruptors are here the *fair traders: casual*, such as smugglers, are but *interlopers:* between the fair trader and the interloper there exists an everlasting jealousy. This being the case, suppose this branch of trade arrived even at its highest possible pitch of improvement—no one Guinea-man could expect to sell any more verdicts than one. His comrade would peach of course: he would of course be let drop out of the list, and there would be an end of him. Therefore, unless the case be such that the price offered for the verdict is more than a place at the Board is worth, the Guinea-man is no less incorruptible than Cæsar's wife was chaste.

Expect not every thing at once. Arm yourself with patience. A few pages more, and—though you will not find the curtain that screens the *verdict-office* so completely *drawn up*, as that which *once* screened the *delay-offices* has now been for these *eleven* years—yet, should your patience serve you till Part II. Chap. 3. a slight *peep* behind *this curtain* you shall have.

CHAP. VI. PURPOSES, TO WHICH INFLUENCE ON JURIES MAY BE MADE SUBSERVIENT.

§ 1. *Blind Confidence in Judges not warrantable.*

IF, for confining the exercise of it within the paths of justice, the power of the Judge stood not in need of any kind of check, the destruction of the sort of check which was designed, and is supposed to be applied to it by the functions of the jury, would not afford any just cause of complaint, any demand for reformation.

If, in the situation of Judge, a man were not liable to stand exposed to the action of any sinister interest, or delusive passion, opposite to the interest of the public, in respect of the *ends of justice*, *viz.* neither on *his own* individual account, nor on account of any *other* individuals or classes of men, whose interests or passions, by whatsoever tie connected with his own, it may happen to him to espouse—were such the real state of things, on that supposition, the exercise—the independent and well-considered exercise—of the functions of the jury would not, in the character of a check to the power of the judge, be of any use; nor therefore would any diminution of that independence present any just cause of complaint, any demand for reformation.

Not that, even on this supposition, the propriety of continuing the use of juries, whose obsequiousness were thus regarded as *certain*, would, in this or any other part of the field of jury trial, be the practical inference. No: the practical inference would be—that, in this part at least, of that field, juries ought to be *abolished*.

For sure it is, that if so cumbrous and expensive an appendage as is the jury-box to the official *bench* were not *useful*, it would be much *worse than useless*. To the course of judicature, in the character of a source of factitious complication, and thence of factitious delay, vexation, and expence, it is, *as it is*, an enormous—*as at best it would be*—a considerable incumbrance: while to such individuals as are loaded with the duty of filling it without recompence, the vexation is such as to constitute, as we have seen,* no

* Suprà, Chap. 4. § 5.

inconsiderable part of the aggregate mass of public burthens.*

In saying *abolished—juries ought to be abolished*—I mean, of course, abolished by proper authority—abolished by Parliament:—not reduced to collections of puppets by the machinations of judges.

But of the several propositions, thus brought to view, for the purpose of the argument, the contraries will, it is supposed, be found true.

Throughout the whole field of special jury trial, for confining the power of the judge—(meaning the exercise of it) within the paths of justice, there exists much need of a check, and that an efficient one.

For, in the situation of judge, throughout the whole of that field, (whatsoever is situated without that field belongs not to the present purpose,) a man is continually exposed to the action of sinister interest, and delusive passion, acting in directions, opposite to the interest of the public in respect of *the ends of justice:* to sinister interest and passion, casually on his own individual account, much more frequently on account of other individuals or classes of men, whose interests or passions, by whatsoever tie connected with his own, it may happen to him to espouse.

Throughout the whole field of special jury trial, obsequiousness on the part of juries—*obsequiousness* (secured, as above, by corrupt influence) is therefore, if the above propositions be true, prejudicial, in a high degree, to the interest of the public in respect of the *ends of justice.* I say *obsequiousness* thus secured: and if so, then so therefore are its above-mentioned efficient causes—*viz. packing* and *permanence.*

* [*Public burthens.*] It was in these sentiments that, in another work (*Scotch Reform*, Letter IV.) on an occasion on which a show had been made of a disposition to improve, partly by imports from *England*, so far as concerned the *civil* (*i. e.* non-penal) branch of law, the system of judicature in *Scotland*, considerations were brought to view, tending to show, that, in the way of *appeal* from the decision pronounced by a *single Judge*, after hearing and examining the parties face to face, (as in a case determined by a *Court of Conscience* in England, a *Small-debt Court* in Scotland, or a *Justice of the Peace* in either kingdom) all the *advantages* derived from the use of Jury-trial might be *introduced* into *Scottish* judicature (not to speak of *English*) and with great *improvement*—all the *inconveniences* avoided.

To those by whom jury-trial is considered in the character of an *end*, than which nothing further need be looked for, or, if as a *means*, a means having, for its *sole end*, creation, preservation, or increase of *lawyer's profit*—(and where is the man by whom it is considered in any more rational or honest point of

§ 2. *Interests, to the Action of which Judges are liable to be exposed.*

MONEY, *power*, *ease*, and *vengeance*, these, together with *reputation*, so far at least as the efficient cause of felicity in this shape may have the effect of serving as a security or means of increase for it in any of those others—reputation, how well or how ill soever deserved, may be set down as indicative of the several interests by which, when acting in the direction of *sinister interests*, the conduct of public functionaries in general, and of Judges in particular, is, in a more particular degree, liable to be warped.

Partiality—viz. in favour of the interests of this or that other individual or class of men—will be apt to present itself as another interest—and certainly not an inefficient interest—distinct from the above. Such as it is, the indication of it may however, in a certain sense, be comprized in the above list: since by that one word are indicated the several sorts of interests already spoken of as comprehended in that list; the only difference being in the *personality* of the individual or individuals, whose interest is considered as being at stake. The pecuniary or money interest, to the action of which, in the character of a sinister interest, I stand exposed, may have for its exterior cause a sum of money which *I myself* am in a way to gain or lose, or a sum of money which *another person* whose interests I espouse, may be in a way to gain or lose: and so in regard to *power*, *ease*, *vengeance*, and *reputation*, as above.

Of these objects of desire, *money* and *power*, especially if considered with reference to no other person than the functionary himself, present, on the present occasion, comparatively speaking, but little matter for attention. To the Judge himself, *money* and *power* are secured by office: *secured* and *fixt*, out of the reach of receiving augmentation, any more than diminution, at the hands of juries: so far as

view?) the *attachment* manifested towards the institution on *this* occasion will be apt to present itself as inconsistent with the *limits* proposed for it on that *other*.

Verily, verily, both the *defence* on this occasion, and the proposed *limitation* in that other, are part and parcel of one and the same plan, in which, to the exclusion of all other ends, the several *ends of justice* have all of them been diligently looked out for, and conjunctly, and—as far as *consistency* could be secured by endeavours—*consistently* pursued.

power is concerned, those cases excepted, if any such there happen to be, (for they are but of casual occurrence,) in which, the affections of the Judge taking an interest, in the way of *partialities*,* in the event of the cause, it may happen to *his power*, in the event of his endeavouring to afford to that partiality a gratification at the expence of justice, to find, in the *power of the jury*, an opposing check.

Love of ease and *desire of vengeance*, may therefore be set down as the two passions or affections, from the influence of which, for want of such check as the power of a jury was intended to apply, the interests of justice are most exposed to suffer in such hands.

Love of ease applies, and applies alike, to *all sorts of causes:* vengeance, unless by mere accident, to but one, and that comparatively a narrow one, *viz. libel causes;* but that, with reference to the interest of the public, so important a one, that all others shrink as it were to nothing in comparison of it.

Not only *money* and *power*, but *dignity* and *respect*, being secured by office, the chief object of solicitude and pursuit remaining to the Judge, is *ease*. But, so far as jury trial is concerned, the *ease* of the *Judge* is as the *obsequiousness* of the *jury*. These *volunteers*, so different from some others, being by the very nature of their situation, and without need of exertion any where, kept in a state of constant preparation and established discipline, waiting and wanting for nothing but the *word of command*, and drilled

* I remember hearing partialities, and even the habit of partiality imputed by many to Lord Mansfield: I cannot take upon me to say with what truth. Partly by situation, partly by disposition, exposed to party enmity, so he accordingly was to calumny. " Lord Mansfield," (said his everlasting rival and adversary Lord Camden once) " Lord Mansfield has a way of saying—It is a rule with me— " an inviolable rule—never to hear a syllable said out of court about any cause " that either is, or is in the smallest degree likely to come, before me." " Now " I—for *my* part"—(observed Lord Camden) " I could hear as many people as " choose it talk *to me* about their causes—it would never make any the *slightest* " impression upon *me*." . . . . Such was the anecdote whispered to me (Lord Camden himself at no great distance) by a noble friend of his, by whom I was bid to receive it as conclusive evidence of heroic purity.

In the days of chivalry, when it happened to the knight and his princess to find themselves *tete-à-tete* upon their travels, and the place of repose, as would sometimes happen, offered but one bed, *a drawn sword*, placed in a proper direction, sufficed to preserve whatever was proper to be preserved. This was in days of yore, when pigs were swine, and so forth. In these degenerate days, the security afforded by *a brick-wall* would, in the minds of the censorious multitude, be apt to command more confidence.

into that sort and degree of intelligence, which is sufficient for the understanding it, *labour*, on the part of the Judge, is reduced to its *minimum*, *ease* raised to its *maximum*. If circumstances be to such a degree favourable, that not so much as the show of explanation is found necessary, so much the better:—at the worst, all *anxiety*, and with it the greater part of the *labour*, is removed by the *pre-established harmony*.

Nor, in this way, is the *reputation* of the Judge worse provided for than his *ease*. Be the man in power who he may, what can be more flattering to him, what, to a superficial view at least, more honourable, than the known fact, that under the name of *opinion*, upon all whose lot has fixt them within the sphere of his intercourse and his influence, his *will* has habitually the effect of *law*.*

For the operations of the sinister interest created by the *love of ease*, every sort of cause, and every sort of judicatory, presents, almost in equal degree, a favourable theatre.

Instead of *love of ease*, say, for shortness, *Sloth*: which, though under the Pagan dispensation, neither god nor goddess, not ranking higher than with *Syrens*,† is not in our days the less powerful; whatsoever might have been her influence in those early times. It is to *Sloth* that, by official persons of all sorts and sizes, but particularly the highest, sacrifices are made continually, and in all shapes: in all shapes, and in particular in that of *justice*, the only one which belongs to the present purpose. Of a sacrifice of this sort, a sketch, taken pretty much in detail, has already been given in another work, *Scotch Reform*, Letter 4, pp. 77-78. Bewitching Syren! A little while, and even before these pages are at an end, we shall see a pre-eminently learned and most reverend person confessing his passion for her, with scarce a gauze before his face. Part II. Chap. 4.

Plutus is apt to betray *his* votaries: to him *justice* cannot readily be sacrificed but in a *tangible* shape. *Syren Desidia*

* This was among the well-known glories of *Lord Mansfield*. This the *finale* of his praises, sounded in his ears, in such dulcet accents, by his sergeant *trumpeter* (who was moreover one of his *Master Packers*) Sir James Burrow.

"I have *not* been consulted, and I *will* be heard," exclaimed one of his puisnes once, Mr. Justice Willes. At the distance of some five-and-thirty or forty years, the feminine scream, issuing out of a manly frame, still tingles in my ears. Whether any note is to be found of it in the Reports of *Sir James Burrow*, may be left to be imagined.

† —Improba Syren
Desidia. *Horace.*

keeps her secrets better: so well indeed, that without hard labour in other quarters, and in no small quantity, sacrifices made to her can seldom be brought to light. Even when a mischance of this sort happens to them, the mischief, be it ever so enormous, finds the public—the English public at least—comparatively indifferent to it. *John Bull*—the representative of this most enlightened of all publics—is a person somewhat hard of hearing, and unless by the chink of money, and that a good round sum—the irascible part of his frame is not easily put into a ferment: and, even then, it is not so much by the mischief which the public suffers, be it ever so heavy, as by the sum of money which the wrong-doer pockets, be it ever so light, that his fire is kindled. Mischief, if the truth may be spoken, does not much disquiet him, so long as he sees nobody who is the better for it.

The *love of ease* is too gentle a passion to be a very active one: but what it wants in energy it makes up in extent: for, there is neither *cause* nor *judicatory*, in which there is not place for it. As to *vengeance* it is only now and then, and by accident, that it comes upon the stage of judicature: but when it does, such is its force, that, in the character of a sinister interest, no interest, to the action of which that situation is ordinarily exposed, can compare with it. For the exhibition of the triumphs of this tyrant passion, and of the sacrifices made to it, the *King's Bench* is, by *patent*, the great and sole *King's theatre;* the liberty of the press, its victim; *libel law*, the instrument of sacrifice.

Behind this sinister interest lurks, frequently at least, if not constantly, another, *viz. self-preservation;* an interest, than which, to judge of it from this its general name, nothing should be more innocent and uncensurable. But *self-preservation* is preservation of one's self from evil in *any* shape: a species of evil, which will be presently seen to be impending—and that too an evil from which, by so pleasant an operation as that of the gratification of *vengeance*, a Judge, in that situation, feels himself every now and then called upon to preserve himself, and with himself, his partners in the firm of *Judge and Co.* together with abundance of his friends, is—the loss of an indefinitely extensive lot of *money* or *power*—whether in possession, or, though not in possession, regarded as within reach:—*viz.* whatever portion of either is not recognized as being the offspring of any species of abuse?

Of the several departments of government, howsoever carved out and distinguished—judicial, financial, military, naval, and so forth—suppose that in all, or any of them, *abuses* exist—abuses, from which the persons, or some of the persons, by whom those departments are respectively filled, derive, each of them, in some shape or other, a sinister advantage. In this state of things, if there be any such thing as an instrument, by the operations of which all such abuses, without distinction, are liable to be exposed *to view*, the tendency of it is thereby to act with hostile effect, against the several sinister interests of all these several public functionaries; whom thereupon, by necessary consequence, it finds engaged, all of them, by a common interest, to oppose themselves with all their means, and all their might, not only to its influence, but to its very existence. An instrument of this all-illuminating and all-preserving nature, is what the country supposes itself to possess in a free press; and would actually possess, if the press were free as it is supposed to be.

§ 3. *Interests, to the sinister Action of which English Judges stand actually exposed.*

THUS much as to the interests, to the action of which, (in the direction and character of *sinister* interests) the probity of a Judge, in every age and country, is *liable* to stand exposed.

But—not to speak of the footing on which the matter may stand in this or that other country—in England at least, so far as concerns *pecuniary interest*—the most uniformly active and generally irresistible of all *sinister interests*—the degree in which the probity of a Judge has ever stood, and still continues to stand, exposed—in *mechanical* language, to the action of *sinister interest*—in *chemical* language, to the action of the *matter of corruption*—is such as cannot any where be exceeded.

Paid as he is paid—and were he even paid on any purer principle—*trained* as he has been trained—*draughted* from the *corps* from which he has been draughted—not only his *interests*, but the *prejudices* begotten by those interests, are in a state of constant, universal, and diametrical opposition to his duty—to every *branch* of that duty—to every one, without exception, of the *ends of justice*—(*Scotch Reform*,

Letter 1. p. 5.)—to the several most immediate ends, not to look out for any remoter ends:—to the *collateral* ends—avoidance of unnecessary *delay*, *vexation*, and *expence*—to the *main* ends, avoidance of *denial* of *justice*, and of *undue decision* to the prejudice of the *plaintiff's* side, and avoidance of undue decision to the prejudice of the *defendant's* side. In a word, in exact proportion as by, or under, the authority of this *Dives* the suitors are *tormented;* he himself—not only in his preceding character of *Advocate* had been *used to be*, but in his present character of *Judge continues* to be—*comforted!*

Not a *delinquent*, high or low—but especially not a *high* and *powerful* delinquent—with whom he is not linked by the bands of a common interest. Not a *wrong*, from which, if not *certainly* and *immediately*, at any rate in respect of its natural and frequently efficacious *tendency*, he does not derive a *profit*. The more *wrongs* the more *causes;* and the more *causes* the more *fees!*

Not an imaginable channel (that of punishable *bribery* alone excepted) in which, in the shape of the matter of corruption, the matter of wealth does not, under the name of *fees*, flow in daily streams into the pocket and bosom of the Judge.—1. Receipt of fees in virtue of his own office under his *own* name. 2. Fee-yielding office, given in appearance to a *clerk*, out of whose hands the profits of it are squeezed. 3. *Sale* of a fee-yielding office for full value. 4. *Fine* or *bonus* on admission. 5. Fee-yielding office given in lieu, and to the saving of the expence, of other provision for a son, or other near *relation* or *dependent*, he *doing the duty*. 6. Or else *not* doing the duty, but paying a deputy. 7. Fee-yielding office given, or the profits of it made payable, to persons standing as *trustees*, for a principal declared or undeclared; if undeclared, supposed of course to be the Judge himself.

No other country upon earth, in which among Judges—(I speak always of those of the *highest* rank, to whom *alone* the *name* is given, and by whom the great and happily uncorrupt body of those functionaries is ruled,) no other country upon earth in which, in this highest rank, amongst these monopolizers of the honour so justly due to the function, corruption has place to an *extent* approaching to that to which it has spread in this country of pretended purity, or in which it is possible that any thing like equal profit should be made by it. In *other* countries, not being practicable

but in the shape of *bribery* or *extortion*, practices proscribed by law, and necessarily open to detection, it is but *casual*: in England, being, in all these other forms that have been mentioned, either *legalized*, or seated *above* the reach of *punishment*, it is, in that highest rank, *constant* and *universal*.

By means of *sine-cures* in general, and *judicial* sine-cure offices in particular, whatsoever money is levied upon the subject is so much extracted from him on *false pretences*: the *tyranny* of *extortion*, and the *turpitude* of *swindling*, are combined in it. In the case of *judicial* sine-cures, by the very men by whom these enormities are punished—punished in cases in which they derive a profit from the punishment, and none from the practice—these same enormities are not only *connived at*, but *participated in*, and the profit pocketed.

Falsehood—corrupt and wilful falsehood—mendacity, in a word—the common instrument of all *wrong*—was, in the instance of all those judicatories (as any man may see even in Blackstone) among the notorious foundations or instruments of their power: and, in every one of them, from the beginning of each cause to the end, sometimes by the *lips* or the *hand*, always under the *eyes* of the Judge, matter of constant and universal practice. Not one of them, in which it is—not merely allowed of, but encouraged; and not only encouraged, but forced, inexorably forced. Without so much as an attempt at argument, in the very teeth of common sense, *falsehood*, the irreconcileable enemy of justice—*falsehood*, under the name of *fiction*—is passed off by them upon the deluded people—passed off as the true friend and necessary instrument of justice!

In such a state of things, behold two *propositions*, between which the perplexed and deluded people are left to make their choice:—1. That falsehood—wilful, deliberate, and rapacious falsehood—is not a vice: or 2. That it is in the power of *man*—of every man who has the power of a *Judge*—to *wash away* the filth of *Vice*, and transform her into *Virtue*.

Hence, if mendacity and rapacity be vices, the very sink of vice is the seat of the titled lawyer, who, to his other titles, blushes not to add that of *Custos Morum*—*Guardian of the public morals*: as if the most noted among procuresses were regularly to write herself over her door—*Guardian of female chastity*!

In the character of an instrument of *corruption*, for the depravation of the *moral* part of man's frame, falsehood

has been scarcely more *useful* to them, more *actively* employed, or more deservedly *prized* by them, than in that of an instrument of *deception*, for the *debilitation*, *perversion*, *confusion*, and *depravation*, of the intellectual faculty.

Fiction accordingly has scarcely been more serviceable in the character of an engine for the accumulation of undue profit and illegal power, than in the character of a species and source of *nonsense*, by which the eye of the understanding, being blinded or bewildered, is thus prevented from seeing the absurdity and wickedness which is at the bottom of it.

In every one of these paths of depravity, the most depraved system that can be found in any other country is left far behind. "*Swearing*" (says one of the characters in a French drama) "constitutes the ground-work of English "*conversation*:" *Lying*, he might have said without any such hyperbole, lying and nonsense compose the groundwork of English judicature. In *Rome-bred* law in general—in the Scotch edition of it in particular—*fiction* is a *wart*, which here and there deforms the face of justice: in English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness.

Let us steer clear of exaggeration.—In this, as in other parts of the field of law, to plant *new* abuses is not even now so easy as to preserve the *old*: and as the resisting strength of the public mind increases, the difficulty cannot but increase.

But if the stock already in existence be in any degree greater than what is desirable, and especially if among them there be any of so hardy a nature as, without need of further care, to keep on growing of themselves, no very powerful plea, it is presumed, will, by this admission, be afforded, in favour of any such unbounded confidence, as must be bespoken for *Judges*, by any person, to whom the check, supposed to be applied to their power by that of *juries*, is regarded as superfluous.

Keeping our minds fixt on jury trial, and the extent to which it is capable of operating, in the character of a check to the enormities above-mentioned, and thence on the amount of the mischief liable to be produced by the destroying or weakening of that check; another observation which, in the way of admission, it may be of use to make, is—that, so far as concerns sinister profit, by far the greater

part of the work of corruption has been executed, by means of a set of *devices*, (See the *list in Scotch Reform*, Letter 1.) to the success of which the concurrence of juries neither is nor ever has been necessary. But neither are instances by any means wanting, in which whatever be the purpose —profit, ease, vengeance, or whatever other sinister advantage may be the object of the day, complete success, even with the aid of the whole host of those devices, may, in one way or other, depend on the *obsequiousness*, so effectually secured, as above, on the part of juries. (*Scotch Reform*, Letter 4, p. 79.)

Upon the whole, under the *fee-gathering* system, as above glanced at, of which system *packed juries*, and *sham jury trial* have come to make a part, the result is—that, unless in an English Judge the nature of man be totally opposite to what it is in every other human being, unless this be assumed, every thing at all times, rather than nothing at any time, ought in common prudence to be apprehended at the hands of an English Judge.

§ 4. *Existing Popularity no sufficient Ground for Confidence.*

BUT *amidst, and in spite of, all this temptation, the purity of English judicature is it not in fact so exquisite, and so universally recognized, as to have become in a manner proverbial? And in this experience is there not that which suffices for the confutation of all that theory?*

Universally?—Not much short of it.—*Proverbial?*—There or thereabouts. But note well the causes :—

1. Impurity, to appearance washed away by *legalization*.

2. Impurity, covered over by perpetually renewed coatings of interested *praise*.

3. By *intimidation* impurity protected against disclosure.

These causes understood, the popularity will be seen to be *the result*—and, as such, *an indication*—not of purity, but of depravity.

Thus much for hints :—follow a few elucidations.

1. Impurity, to appearance washed away by legalization.

Be the *system* what it may, and let *impurity* have risen under it to ever so high a pitch, yet if the system be but of old standing, the sanction lent to it by *antiquity* is sufficient to prevent the impurity from fastening any the slightest stain upon the reputation of the system: as also, so the system be

but legalized, upon the reputation of the Judges, be they who they may, who act under it.

In the way of *sale*, or in any other way, suppose the Judge to derive an advantage from an office, the profits being composed of *fees*, the aggregate amount of which it depends upon himself to increase or preserve from diminution: for example, by increasing or preserving from diminution the number of the *occasions* on which they shall be received. If among the acts by which an advantage of this nature is capable of being reaped, there be any one which being *prohibited* by law, and *made punishable*, is, upon occasion, *actually punished*,—then it is, that in case of his being known or suspected to have done any such act, his reputation will be more or less affected. But let that same act be allowed by law and legalized, his reputation remains untouched.

Now there are two *sorts of law*, by either of which, or by a mixture of both, a judicial practice may be *legalized*: one is *common*, alias *unwritten* law; and this is the sort of law which (in so far as a rule of action which has no determinate set of words belonging to it can be said to be *made*)—has for its makers the Judges themselves; since it is by their own practice that it is made. The other is *statute* law; and in the making of this, through the means of their partners in trade in both houses, they have at all times possessed and exercised a most baneful, and, if not altogether irresistible, scarce ever resisted influence.*

* 1. For an example of profit, legalized by their own practice solely, and thence by their own sole and sufficient authority, take the case of *sham Writs of Error*.

By *sale of delay*, in pieces of about a *year's* length, to swindlers and others, defendants with other men's money in their pockets, on pretence of *errors*, known alike to the purchaser and the vender to have no existence—the Judges lending, *every one of them*, his sanction to the imposture, annual profit, anno 1797, as per 27th Finance Report, anno 1798—

To the Chief Justice of the King's Bench. . . . . £1120 19s. 6d.

To the Chief Justice of the Common Pleas . . . . 733 3s. 11d.

Aggregate *minimum* amount of corrupt profit, derived in 15 years ending 1807, by the whole *firm* (Judge and Co.) from that source alone, (according to a computation made from *a book of practice, viz. Palmer's Tables of Costs*, 5th edition, London, 1796, applied to "An Account of the number of Writs of "Error made out by the Cursitors of the Court of Chancery from the year 1793,". presented to the House of Commons in pursuance of an order, dated June 14th, 1808,)—aggregate amount for the 15 years. . . . . £442,045 10s. 2d.

Annual amount on an average (bating fractions) . . . . 29,469 0s. 0d.

Of the effect of the sinister interest under which the *judicial system* of this country, or call it the *system of proce-*

Number of *families* (plaintiffs families, not to reckon defendants) thus *tormented*, for the space of a year each, in these same 15 years, 9,226.

Whereof, *to* (would it be too much to say, *for?*) the *comfort* of Lord Kenyon, about. . . . . 5,373.

Do. *to* Do. of Lord Ellenborough, about. . . . . 3,853.

9,226.

Here we see *one* specimen of the corruption, which now for these eleven years last past (reckoning from the publication of the above-mentioned Finance Reports)—for these eleven years last past (not to go any further back)—has continued on foot, with the full knowledge and connivance, if not of all the members, at any rate of all the *lawyer-members*, of both Houses.

The elementary *data*, from which the above calculation has been made, are as follows :—

1. Costs of *a* Writ of Error from *Common Pleas* to *King's Bench*, exclusive of those which take place where the Writ of Error is not a *sham* one, *i. e.* when it is *argued*—which it scarce ever is—perhaps not once in the 15 years, 55*l.* 0*s.* 5*d.*

2. This, multiplied by 2,650, being the number of Do. Writs in the 15 years, gives. . . . . £145,805 4*s.* 2*d.*

3. Costs of a Do. from King's Bench or Exchequer to Exchequer Chamber, 43*l.* 13*s.* 6*d.*

4. This, multiplied by 5953, being the number of Do. (exclusive of 46 *argued*, those *argued* making not so much as 1 in 130) gives. . . . . £259,997 5*s.* 6*d.*

5. Costs of Do. from King's Bench or Exchequer Chamber to the House of Lords (deduction made of expences attending *argument*) 58*l.* 3*s.* 6*d.*

6. This, multiplied by 623, the number of Do. gives. . . . . . . £36,243 0*s.* 6*d.*

Total . . . . . £442,015 10*s.* 2*d.*

In some instances, by the variable nature of the expences, in others by th obscurity that overhangs such accounts of them as have transpired, *errors* in the above figures cannot but have here and there been produced. But the utmost possible amount of them is not considerable enough to warrant the expenditure of the quantity of letterpress that would be necessary for the indication of these dark spots. For the same reason the indication of a large mass of articles by which the totals of profit are increased, *viz.* as well of profit to the use of the *firm* of Judge and Co. at large as of Do. to the use of the *managing partners* in particular, is omitted. (Of this branch of the trade of Judge and Co. a particular account, extracted from the *Finance Report* above-mentioned, together with other documents furnished by the *House of Lords*, and illustrated by *elucidations*, has been digested into the form of a *Table*, which, under the name of English and Scotch Appeal Table for 1795, 1796, and 1797, may be had of the publishers of this work.)

II. For an example of corruption legalized under the influence of lawyers by *Statute law*, take the case of the *statute* 5 and 6 Edw. 6. c. 16, " *against buying* " *and selling of offices.*"

Object, as declared in the preamble, " avoiding of corruption. . . . in the of- " ficers. . . . in those places. . . . wherein. . . . is requisite. . . . the true administra- " tion of justice, or services of trust."

Then comes a wordy section, prohibiting " *the sale,*" and so forth, " of any

dure, has been throughout its whole texture, and all along manufactured, the samples given in the note are but as so

" office. . . . which shall in any wise: . . . concern the administration or execution " of justice."

Lastly comes a section which the Chief Justice of the King's Bench and Common Pleas (not to speak of the *then* " Justices of Assize") had the effrontery and good fortune to get inserted, exempting them, (with their successors) and *them alone*, from the operation of the statute.

Not that, had it even been purged of this exemption, it was in the nature of this statute, to have contributed any thing to the object thus professed by it: half a dozen different channels have above been indicated, through any one of which, *advantage* may be extracted by a Judge from the *increase*, *disadvantage* sustained by him from the *decrease*, of the mass of emolument attached to an office, which he has at his disposal.

Shut up any one or more, leaving any one or more open, what is the consequence? Whatever parcel of the matter of corruption would have flowed into his pocket and his bosom, through the channels thus shut up, flows in through those that remain open: *aggregate* mass of corruption just the same *after* the law as *before*.

But besides being useless, the effect it would have had, had it had any, would have been worse than none. Affording the *appearance* of security, it would have increased confidence, diminished suspicion and vigilance: but, the security being false, and the confidence ill-grounded, increased security to corruption would have been the effect of the diminished vigilance.

The only means, but that a most effectual one, by which the matter of corruption, in the shape of pecuniary profit, can from the source here in question, be prevented from flowing into the pocket and bosom of the Judge, has been already indicated, (*Scotch Reform*, Let. 1. p. 8.) *viz.* conversion of the *variable* mass of emolument into a *fixt* one: i. e. of income composed of *fees*, into income in the shape of *salary*. Connivance at *non-feasance* or *misfeasance*—at neglect or mal-practice, whether the result of improbity or incapacity, is the only mode in which, in *that* case, it could be either in the *inclination*, or in the *power*, of the Judge to participate by connivance in the misconduct of an unfit subordinate.

Not that, by any such purely prospective change, the existing depravity of the system would be washed away, or so much as reduced:—it would only be prevented from receiving increase.

III. For an example of corruption legalized by a *conjunct* operation, *viz.* partly by law of the Judges own making, partly by statute law, made under their influence, as above, a case already brought to view may serve.

Under the special jury system:

1. To a *non-lawyer*, though a man of opulence, distinguished by the title of esquire, and, according to the assumed principle, extra paid, in consideration of his extra opulence—to every such non-lawyer, for serving in the character of *special juryman*, in a state of confinement for an indefinite length of time, amounting to any number of hours, 5, 10, 15, or 20, as it might happen, a sum which, after having under their management been subjected to such a degree of irregular excess as had become scandalous, was at length by the legislature limited to 1*l.* 1*s.*

2. To one sort of lawyer, an attorney—in his situation of *under sheriff of Middlesex*, a constant dependent of theirs—to this sort of lawyer, by their own uncontrouled fixation, for doing nothing, 2*l.* 2*s.*

3. To another dependant of theirs, their *Master Packer*, for doing, in point of labour, next to nothing, in point of effect much worse than nothing, 2*l.* 2*s.*

many handfuls of *tares*, (let us not say *wheat*) taken at random out of the contents of a whole granary. In a parenthesis as it were, as here, more will surely not be expected.

Such is the *mode*, and such the *hands*, in and by which, upon a careful computation,* the mass of *factitious expence* and *delay*, (not to speak of *vexation*) with which the approaches to justice are clogged, have, according to circumstances, been increased to some *scores*, and even to some *hundreds of times* what would otherwise have been its amount, and the great mass of the people—from *nine-tenths* to *nineteen-twentieths* or more—fixt—with only here and there an exception produced by inconsistency—fixt in a state of perpetual outlawry: exposed without redress to *injury*, in every shape in which it is *not* deemed criminal, besides a multitude in which it *is*.

But this system of general proscription, this system of general *outlawry*, being the *work* of law, is *according* to law: the creators and preservers of it, being all men of law, are "all honourable men:" and in the words of Blackstone, "*every thing is as it should be.*"

2. Impurity, covered over by perpetually renewed coatings of praise.

Partly by the imbecility, partly by the interested artifice of the makers, the *rule of action*, *unwritten* and *written* law together, having been worked up into a *chaos*, of which it is impossible for the people to form *to themselves* any tolerable conception: hence such conception as they have of it, is grounded, exclusively, upon the *reports* made of it by the *manufacturers* themselves. But the worse they have made

Total of *factitious expence*, and Do. *lawyer's profit*, per cause, from that single source, *viz.* substitution of special to common jury trial, as above—of factitious expence having for its effect sale of justice to those that pay the price, denial of justice to all such as cannot pay it, as above.................... £7 8*s.* 8*d.*

Add fees to the special jurymen, who being at length rendered permanent, and placed under the dependence of the Judge, are thereby become a sort of official lawyers................. 12 12*s.* 0*d.*

Total *minimum* of extra expence of a special jury............ £20 0*s.* 8*d.*

In a table of actual costs given by Palmer, pp. 12 and 13, instead of the 7*l.* 8*s.* 8*d.* I find for lawyer's profit, 12*l.* 12*s.* 11*d.* In this total is indeed included a charge of 2*l.* 2*s.* as paid to the sheriff for summoning the special jury: and these being 24 in number, and their abodes, for any thing that appears, scattered over the country, this part of the expence cannot assuredly be set down as profit, unless it be so much over and above what the sheriff, i. e. the under sheriff, would have received had the jury been a *Common* one.

it, the greater their apprehension, lest its depravity should be discovered. The less *deserving* it is of praise, the greater the *need* it has of praise: the more flagrant its defects, the greater the demand for the only sort of covering of which they are susceptible. *Scotch Reform*, Let. 4, p. 78.

1. In regard to the *system*, the more afflictive it is to the people in the character of *suitors*, the more profitable it is to the *man of law:* and the greater the profit he derives from it, the greater the quantity of praise which it is his interest to bestow upon it, and which accordingly he ever has bestowed, and ever will bestow, upon it.

2. So in regard to the *persons*, by whom for the time being it is administered: the persons themselves being linked together by the tie of one common interest, and all who either *dare* to publish *any* account of their proceedings, or are *qualified* to publish any tolerably *correct* one, being candidates for their favour, the consequence is—that, with the rare and casual exceptions produced by party jealousies, the same picture of scarcely diversified excellence has served for all of them at all times. The portrait is the same: and all that remains for this and that new limner is to write under it this and that new *name*.

In this happy state of things, the system, and those by whom it is *administered*, afford reciprocal demonstrations of each others' excellence: the excellence of the system is proved by the excellence of those by whom it is administered: and the excellence of those by whom the system is administered is proved by the excellence of the system *by* which they were *formed* and *under* which they *act*.

Up to the instant which sees him mounted on the pinnacle of the bench, the man of law is recognized by every body, as being of the number of those to whom *right* and *wrong*, *truth* and *falsehood*, would be matter of complete indifference, were it not for the predilection naturally entertained for the best customer: and in whom the minister of the day, through whose hands in his way to that pinnacle he must first have passed, has found an instrument no less ready, for the wages of *corruption*, to do the work of corruption upon the *largest* scale, than the individual wrong-doer has found him to do the work of iniquity upon any *smaller* scale. Yes, and although his interest remains at least as opposite as ever to the interests of the *community*, in respect to the *ends of justice*, no sooner have the form and substance of his *robes* undergone the customary *trans-*

figuration, than the *heart*, which they so well cover, is universally understood to have undergone the correspondent change. The *corruption* has put on *incorruption:* and the *will*, the training of which towards the paths of iniquity, had till then been so generally recognized, is now secured against all danger of taking a *wrong direction*, being itself become the *standard of rectitude*.

3. By *intimidation*, the impurity protected against disclosure.

While, under the spur of every excitement which avarice or ambition can apply—(every thing that is said of the law and its administrators, being a sort of *prize-essay* on their perfections)—while, by the force of this *stimulus*, whatsoever features of excellence it posseses are raked together, and held up to view, decorated with every embellishment that interested eloquence can bestow—its defects, were they still more flagrant than they are, would be, as they ever have been, kept covered up and protected against disclosure, by every force that either *authority* or *power*—influence of *understanding* over *understanding*, or influence of *will* over *will*—can bring to bear upon the subject.

Point out a defect in *the system*, all *ears* are *stopped* against every thing you can *say*, all eyes *shut* against every thing you can *write:* or if haply *indignation* breaks the bridle set upon the tongue and the pen by *prudence*, hatred and contempt in all their forms—sincere hatred, accompanied with simulated contempt—are poured upon your head. *Jacobin*, *leveller*, enemy of social order—theorist, speculatist, visionary—compose the arguments you have to encounter—together with whatsoever other appropriate epithets and phrases, substitutes to truth and reason, are furnished by the *Courtier's and Lawyer's Gradus*.

Touch upon those *who act under the system*—*under* it—or, if so it please them, *over* it—point out any defect in *their* conduct in respect of it, millstones still better adapted to the purpose of *crushing*, than either hatred or contempt—ruin in the shape of *prosecution*—and, if that be not enough, in the shape of *imprisonment*—millstones ready to be let fall every moment, at the nod of caprice or vengeance—hang aloft over your head.

Victims of the system, or sympathizing with those that are, whatsoever complaints men have ventured to give vent to on this ground, terror and prejudice have combined to point to the wrong mark. The system is faultless; the

creators and upholders of it are faultless: but, in the shape of wicked *attornies*, evil spirits creep in now and then, and convert into poison the salutary remedies it affords.

No representation was ever more opposite to the truth. The quantity of mischief produced by any thing which, under the name of *irregular* practice, is either punishable or censurable, is as nothing in comparison of that which is produced by *regular* practice—by that which has been legalized and organized for the purpose: and even the loopholes, at which the irregularities have crept in, are amongst the works which the regularity of regular practice has had for its objects and its uses. If judgments are *snapt*, it is because, by the pre-established mechanism, (*Scotch Reform*, Let. 1. *Devices* 5 and 8) they were framed as they are, to fit them for being snapt. Now and then, in great ceremony, in the character of *scape-goat*, or, to speak in modern language, in the character of *tinman*, in expiation of the sins of the whole tribe, a miserable attorney, the child of the system, is sacrificed on the altar of offended justice: but the chief profiter by all those sins, is the *Chief Priest*, who with indignation on his brow, and laughter in his heart, offers up the sacrifice.

By the inferior branch of the profession—by the *attorney* branch—the system has all along been taken such as it has been found: it is by the two superior branches—composed of *Judges* and *Advocates*—Advocates in the *senate*, Judges occasionally in the *senate*, constantly on the *bench*—that it has been made such as we *see*, or rather as we *feel* it.

Of the three branches the inferior, as it is the most populous, so is it in its nature the least impure. To an attorney—those operations and instruments excepted, in which the part he takes is compulsory and unavoidable, having been imposed upon him by Judges—to an attorney, as such, the language of insincerity is never necessary. On the part of the Advocate, the necessity and consequently the practice, is constant: the only choice there is for him is between the *more* and the *less*.

Such is the mind of the *Advocate*: and the *mind* of the *Advocate* is the *stuff* of which the mind of the *Judge* is made.

Filling the bench from no other fund than the bar, is it not exactly such a mode as if boarding-school-mistresses and governesses, were never to be chosen but from brothels?—

Yet by giving to the matter and language of the law, a texture nauseous to every liberal mind, and impenetrable to every mind not sharpened by hunger, an exclusive ad-

mission to the bench has been secured, in favour of a profession which, if either love of justice or of truth had been considered as necessary qualifications, would for ever have stood excluded.

Obvious as they are, against all these considerations the *non lawyer* has learnt to shut his eyes. At an early age, the picture of the law drawn by Blackstone had been put into his hands: a picture in which all deformities and turpitudes are plaistered over with the most brilliant colours. To pry into the original would require hard labour: to glance over the picture requires but a glance. Set before him the original, he turns aside from it: to an insight into the original, he prefers a dream over the picture.

Thus it is, that when rightly considered, the *popularity* of the system—paradoxical as at first sight the proposition cannot but appear—the *popularity* of the system, so far from being a conclusive proof of its excellence, affords a *proof*, inasmuch as it is among the *results*, of its depravity: the *depravity* being the *cause*, of which, through the intervention of the *intermediate* causes that have been brought to view, the *popularity* has been the *effect*:

1. *Depravity*, *viz.* in respect of *factitious delay*, *vexation*, and *expence*. 2 *Profitableness to lawyers*, in respect to their profit upon the expence. 3. *Popularity among lawyers*. 4. *Praises by lawyers*. 5. *Popularity* among the people at large, but more particularly among the *ruling classes*, connected in so many points of sinister interest with the lawyers—in *three* out of the above *five* we see the *intermediate* links, by which a *cause* and *effect*, to a first view so wide of each other, have been brought into connection.

Important as these topics are—*viz.* the *goodness* of the system, and the *virtue* of those who act *under* or *by virtue of it*, to the present purpose they belong in no other point of view than this:—of the packing system—being a system which, it has already been seen, is *established*, and, as it will soon be seen, has been *avowed*, the effect—(quoth the argument *against* it—say in lawyer's jargon *the declaration*)—is to destroy this part of the constitution, by destroying the check which the power of the jury was intended to keep applied to the power of the judge:—nay; but so transcendently pure, (quoth the argument in favour of the package—say *the plea*) so transcendently pure, under and by virtue of the system is the virtue of the judge, that no such check is or ever can be necessary. Such be-

ing the plea, it became necessary to *traverse* it; and if the *plea* itself be no *departure*, so neither is the *traverse*.



CHAP. VII. Chief Purpose, crushing the Liberty of the Press.

§ 1. *Liberty of the Press—has it any and what existence?*

WE come now to the grand and paramount use of the *packing system*—the *crushing the liberty of the press*—destroying whatever remains of it undestroyed.

To prevent indistinct or erroneous conception, a few words of explanation may here, once for all, be of use.

King *de jure* and King *de facto*, is a distinction familiar to every eye, that has ever glanced over English history. The same distinction must be applied to *the liberty of the press*, by whosoever would be saved from falling into error and heterodoxy on this scabrous ground: *Liberty of the press by law?* No. That sort of liberty excepted which consists in the non-existence of a *safety-shop*, in the shape of a *Licencer's office*, no such thing either *has* or ever *has had* any existence. So, embodied in the person of Lord Mansfield, the soul of the *custos morum* certified to some of us in 1770.* So, embodied in the person of Lord Ellenborough, the same guardian spirit of good order confirmed to us in 1804.†

Liberty of the press *de facto?*—Yes: *viz. that* which, being *contrary to law*, proscribed by law, has all along maintained a sort of rickety, and still maintains a momentary half-existence, in the teeth of *consistency* as well as law, by means of *breach* of the law in *low* situations, and *non-execution* of the law in *high* ones.

"* The *liberty of the press* consists in no more than *this*—a liberty to print "now *without* a licence, what formerly could be printed only *with* one." Per *Lord Mansfield*, in *K.* v. *Woodfall*, as quoted in a note in the trial, *K.* v. *Almon*, 2d June 1770, p. 62.

"† Gentlemen, the law of England is *a law of liberty*, and consistently with "this liberty, we have not an *imprimatur:* there is no such *preliminary licence* "necessary." *Lord Ellenborough* in *K.* v. *Cobbett*, as reported in Cobbett's Register for June 4, 1804.

Hence it was, that in the place of any such words as *destruction* or *destroying*—which otherwise would have been so much more obvious—it was necessary to look out for some other of a less determinate import, such as *crushing*, as above. For of any such word as *destroying* the effect would have been to bring in with it, and keep attached to it, the idea of *existence:* than which, as above, a more dangerous heresy could not by any Englishman, Protestant or Catholic, be entertained.

But, forasmuch as, in neglected bodies, vermin of all sorts will be apt to crawl into existence, hence comes the necessity which persons in "*high situations*" are under, of keeping in their hands the means of *crushing*—as often as in any such shape and stature as to render itself troublesome, it happens to it to shew itself—the liberty—but, forget not for a moment, the *de facto* liberty—of the press.

In the first place, while pen and ink remain still at command, I shall endeavour to bring to view a sketch—an extremely slight and temporary one—(for that is all that can here be given)—a sketch, or rather as before a *sample*—of the interest which not only *Judge and Co.* as above, but moreover the *high connections* of the *firm*, have, in keeping the liberty of the press in the sort of abortive embryo state, in which it has so effectually been preserved; *viz.* by the hands by which, had convenience prescribed, and possibility permitted, it would have long ago been no less effectually destroyed. I shall then, but rather in the way of *recapitulation* and *reference*, than in any other, add the little that can be necessary to shew the assistance that may always be depended upon from the zeal of the *Master Packer's office*, and the discipline of the *Guinea Corps* on the occasion of so necessary a service.

In the catalogue of abuses, Judges have *their* peculiar articles, other high seated persons have theirs. But, towering above all the rest, *one* abuse there is, in the profit of which Judge and Co. find their partners, in the very highest and most impregnable situations: in the one House, in the other House, in the Cabinet, in the Closet: yea, even among those whom "*the King delighteth most to honour.*" I speak of that congeries of abuses, the component elements of which are *Law-sine-cures.*

So far as Judges alone are concerned, it has been slightly touched upon already: but in consideration of the prodigious increase of strength, given to the alliance bipartite

between *judges and wrongdoers*, by the accession of *Court-favourites*, and the *triple alliance* thus formed for carrying on with irresistible force the predatory war against the common enemies, *viz. Liberty* and *Justice*, a few ulterior elucidations, respecting the nature and cementing principle of the alliance may have their use.

§ 2. *Improbity in Judges, and their high Allies—its hostility to the Press.*

SOME years ago,* on the examination of a question of finance, I found occasion to inquire in what way, by the taking out of the pockets of the people a given sum of money, the greatest possible quantity of mischief was produced. The result was—by assessing it, in the form of a tax, on the several *operations* and *instruments*, the performance and exhibition of which were rendered necessary to a man to enable him, whether in the shape of plaintiff or in that of defendant, to take his chance for justice.

Affliction heaped upon affliction, in the case of him who *has* wherewithal to comply with the exaction—*denial* of *all relief*, *exposure* or rather *subjection* to all imaginable *wrongs*, in the case of him who *has not* wherewithal to satisfy the exaction—such are the shapes, in one or other of which, or both, the mischief manifests itself; and in the latter case, being the case of *virtual outlawry*, a vast majority of the subjects of the British empire, say *nine-tenths*, say, more likely, nineteen-twentieths, subject to limitations and exceptions too particular, and upon the whole of too little extent, to admit of notice in *this* place, would be found. See *Scotch Reform*, Let. 1. p. 9, and elsewhere.

The quantity of money, taken from a man on this account, being, in the mathematical sense, given, i. e. *determined*—what the *appellation* employed on that occasion may happen to be—for example, a *tax* or a *fee*—as well as what the *pocket* may happen to be, in which it finds its resting place after it has gone out of his own—whether that of the *public*, for example, or that of a *judge*, or other *man of law*—is to *him*, and in respect of the quantity of suffering of which in his instance the defalcation is productive, a matter of indifference. Yet so it happens, that though the quantity of money

* Anno 1796, in the pamphlet entitled, *Protest against Law Taxes.*

so raised being *given*, a *tax* on *law proceedings* is by far the worst of all possible *taxes*, yet, by the money raised on law proceedings under the name of *fees*, mischief, to an incomparably greater amount, has been produced, than by money raised on the same occasion under the name of taxes.

The reason is altogether simple. By the *man of finance*, at whose instance the money is exacted in the name of *a tax*, the *occasions* on which it is exacted are *not created*, but taken as they are found. But of the *man of law*, especially in the station of *judge*, by whose *power*, and, in some shape or other, for whose *benefit*, the money is exacted in the name of a *fee*, it *has* been in the power to *create* the occasions on which it is exacted, *which accordingly he has done*. And in this difference, the immense load of misery, so regularly manufactured by *judges*, their connections and dependents, has found its cause. The amount of this mischief has in some sort found its expression, in the difference between the amount of *factitious delay*, *vexation*, and *expence*, habitually created in the *technical* mode of procedure, stiled on this account the *fee-gathering*, as contradistinguished from that *natural* mode, which, without a total dissolution of the bonds of society, could not have been by its overbearing antagonist utterly expelled. See *Scotch Reform*, Let. 1. p. 9, and throughout.

Of these fees, by the concourse, as usual, of sinister design and accident, masses of emolument of different bulks, from that of a bare subsistence to ten, twenty, or even thirty thousand pounds a year and upwards, exacted by so many different persons, have been composed; and here comes the community of sinister interest, by which the Judges of all the high judicatories without exception—and in particular the Chief Justice of the King's Bench—the master manufacturer of *libel law*—and in effect the absolute master of *the press*—have been linked together: linked with each other, and with some of the most influential members, of those supreme assemblies, from which alone remedy to abuse, in this or any other shape, can come.

Where, of the masses of emolument thus formed, the bulk has been to a certain degree *moderate*, (being received, in all cases in the name of *reward for service*) the reward has been suffered to remain in the pocket of him by whom the service has been performed.

Where it has happened to the mass to swell to such a

bulk as to attract the notice of irresistible rapacity in a higher sphere, it has been fastened upon as a *prey:* and, a *comparatively small* pittance, though by the *experiment* proved to constitute an *adequate* compensation for the burthen of the service, being left to the low-seated individual by whom the service was performed, the remainder has been seized by the high-seated personage, by whom in *that* shape no service whatever has been rendered, even in pretence; and to whom, in many instances, it has never been *necessary*, that he should have rendered to the public any the smallest service whatsoever, in *that* or any *other* shape.

Of these enormous masses of misery-making emolument, out-stripping by far in magnitude, if not in mischievousness, whatever has been produced by the judicial system of any other the most outrageously mis-governed country, some have been seized by Judges, and above all by the Chief Justice of the King's Bench—others having been left in the hands of the Crown, have fallen a prey to the vultures that hover about a Court. And here we see a natural bond of the closest union between *Court* and *Bench*.

At present (it may be said)—whatsoever may have been the case formerly—at present no such sinister interest is created by any of these masses of emolument. For, at present—the maxim having been established, that no mass of emolument in possession, and obtained without breach of law, shall be taken from any man without an equivalent—no man has any interest in the retention of them—neither a Judge nor any one else.

To this observation the colour of reason is not wanting, but the substance is. Allowances which, under the spur of reform, have thus been given by the legislature under the name of *equivalents*, have scarce ever been complete.

Of the masses of emolument in question, *viz.* those attached to sine-cure or over-paid judicial offices, it is the nature to go on increasing, as population and wealth increase, from year to year: and this, even in the way of *natural* increase, and setting aside whatsoever *factitious* increase may be contrived to be given to them by the combined ingenuity of the partnership. But by any allowances that should be given in lieu of them, under the name of *equivalents*, *no* such increase would be experienced: they would be *fixed* sums in the nature of *pensions*.

Of those ever increasing masses of emolument, not only

the *possessors*, but the *expectants*, know of course much better than to submit to any *commutation*, so long as, by any means not punishable, it appears possible to avoid it.

Pillaging the future as well as the present, the *Gavistons* and *Spensers* of successive ages—nor let the present be forgotten—contrived to obtain in *expectancy* those masses of ill-collected and ill-bestowed wealth, life after life. *Passion* and *policy* have here acted in alliance. Passion *seized* on the booty: policy rendered it the more *secure*. The more enormous the prey, the greater and more burthensome would be the *compensation* necessary to be given for it under the name of an *equivalent*. So long as the burthen falls on men whose afflictions are productive of no disturbance to the ease of the man of finance, it tells for nothing. [*See Protest against Law Taxes.*] So long as the burthen continues to be imposed by a tax which, though beyond comparison more mischievous than any other, was not of his imposition, the man of finance had no personal concern in the matter, and how enormous soever may be the mass of misery produced, it formed no object of his care. But to provide the compensation, if that came to be provided, was so much hard labour to him: while of those he has to deal with and to cajole, the great crowd is composed of such as care not what mischief is produced by a tax, or any thing else they are *used to*, but cry out of course against every thing of that sort, as of any other sort, when it is *new*.

The law moreover is a sort of *black lottery*, a lottery of all prizes indeed without blanks, but the prizes so many *negative* quantities; instead of so much *profit*, so much *loss*: and the same confidence in fortune which secures to a man's imagination the *acquisition* of prizes in the *state lottery* so called, secures to it the *avoidance* of them in the lottery of the law.

And thus it is that by every continuance given to this species of depredation a fresh obstacle to the abolition of it is opposed.

You call this economy? Do you? Know then, that, by this economy of yours, the mass of public burthen, so far from being diminished, will be increased:—cries the iron-hearted sophist, in whose balance the heaviest load of misery in which he and his confederates expect not to bear a share, weighs but as a feather.

Turn now to the Despot of the press, and consider what in this state of things the plan of policy is which in his situation a man may be expected to pursue. His first object

would of course be the affording the most effectual protection to abuse in those instances in which the benefit of it is in the whole, or in part, reaped by himself and his own immediate connections.

But to protect that same abuse with its benefit against *limitation*, and even *reduction*, under the name of *compensation*, might require support and alliance elsewhere. To protect with effect the abuses the benefit of which accrued immediately to himself, it would therefore be necessary for him to extend his protection without distinction to all established abuses, from which any other man so situated as to be capable of giving him the needful support, derived or could conceive himself to derive in any shape a benefit: in a word, to act in the character of *protector-general* of all established abuses.

The *liberty of the press* being their common and irreconcileable enemy, the liberty of the press became the necessary object of their common and interminable war: existing, it was to be destroyed: not existing, it was, so long as possible, to be prevented from coming into existence.

And here we see the *Knight's service* looked to at the hands of the *Guinea corps* and its *Squires*.

Of the energy and effect, with which this conspiracy among governors against good government has been carried on, divers exemplifications will present themselves as we advance.

§ 3. *Incapacity in Judges, and their high Allies—its hostility to the Press.*

By this co-partnership in the profits of mis-rule, the bond of union, formed as above, between Judges and the other leading members of government, is a *constant* one. But besides this, there is another which, how frequently soever exemplified, may, in comparison of the former, be termed an *occasional* one: I speak of that, in which *incapacity*—congenial and mutually sympathizing incapacity—is the cementing principle.

Suppose a Judge—no matter in what particular respect—incapable of discharging the duties of his office: discharging them *ill;* or—what constitutes the most palpable of all exemplifications of incapacity—*not at all.* If on the part of the suitors to whom such his incapacity has been a source of injury—or, on the part of other persons, prompt-

ed by *sympathy* for their sufferings, or by the pure *love of justice*, *facts* indicative of this incapacity, or *complaints* grounded on those facts, were made public, the consequence *might* be—an obligation on his part to withdraw from the situation, his continuance in which had rendered him an instrument of such extensive injury.

To any such unfit Judge, a free press would naturally be an object no less odious and formidable than a prison to an ordinary delinquent, whose situation had not elevated him above the reach of justice.*

But by the same cause, *incapacity*, by which a free press is thus rendered an object of hatred and terror to a func-

* One shape, and perhaps the only shape, in which, in the station of *Judge*, the existence of *incapacity* can be seen standing out of the reach of doubt is *indecision*. For, if *habitual*, it may in this shape stand expressed, and demonstrated in *figures*. Thus, suppose, in a given single-seated situation, three Judges occupying that situation successively for the same length of time. The first leaves no arrear: the second leaves an arrear: the third clears off the arrear that had been left by the second, and himself leaves none. Suppose now, on the part of the second, the degree of *indecision* such, that the number of litigated cases decided upon by him was not a *tenth*, not an *eighth*, not a *sixth*, or suppose it were as much as a *fourth*, or even as a *third*, of the number dispatched by his predecessor in the same length of time. In such a case, not only must the unfitness of such a Judge for the situation be clear to every body else to whom these propositions are known, but it is impossible that it should be matter of doubt to the incapable Judge himself. But the Judge being thus necessarily and fully conscious of his incapacity to discharge the duties of the office, the result in point of *mischievousness* and *wrongful profit* is—besides the infinite and inappretiable mass of misery produced on the part of suitors—*peculation* to the amount of the undue profit extracted from the office, the duties of which were thus left unperformed.

Incapacity in a shape thus palpable, swollen to a pitch which, on the part of him who reads of it, puts belief to the stretch, is among the endemial diseases of the present time, and not the least bitter of the bitter fruits of *libel law*. Not long ago one case of this sort came out incidentally in the *House of Commons*: (*See the Times Newspaper, 4th July*, 1807, *Cobbett's Parliamentary Debates, Vol. IX. p.* 731.) and in the profound indifference with which the facts were heard, though exhibited in *numbers* (to avoid ambiguity, let us say in *figures*) may be seen an argument, a stronger than which can hardly be looked for, by those to whom a recurrence to first principles in the constitution of that assembly is regarded as a necessary measure. One instance happened thus to transpire in print, from the only place, from which it is possible for grievances of that sort *so* to transpire: every where else *libel law* keeps them from the press with the degree of certainty, for the securing of which libel law with its terrors was and is intended. But it would be informing him of the existence of the sun at noon-day, were it to be said to a man of business in the profession, that the one here alluded to is not the only instance in which, but for the interested connivance which seals up lips within doors, and the terror which chains down all pens without doors, incapacity not less palpable would long ago have been brought to public *light* at least, if not to *justice*.

tionary seated in the situation of Judge, it would of course be rendered an object of the like emotions to a functionary in any other situation: to a functionary, to whose apprehension any the least danger were to present itself of his seeing such his deficiency exposed to view.

Men who, to all practical purposes, are seated above the law, (and the existence of an indefinite multitude of men self-seated in the situation, is a fact unhappily but too incontestable) men so circumstanced as they—have nothing to fear from any *other* quarter—so, as far as they have any thing at all to fear from *any* quarter—have every thing to fear from the *liberty of the press.*

Accordingly where, on an occasion already spoken of, the recent grand attack was made upon that branch of English liberties, and for the more effectual accomplishment of those purposes (if of any purposes at all) the modern case *de famosis libellis* was displayed to view—and the fundamental principles of *libel law* developed, and adapted to *existing circumstances*, among the propositions laid down upon that occasion was—that in speaking (*viz.* in print) of any man "*placed in a high situation*," to say any thing "*mean-*"*ing to infer that*" he "*is ill-placed*" in (such) "*his high situation*" is "*a libel:*" and this, even although his unfitness for that high situation be of no worse sort, than that which is not incompatible with his being "*fit for the ordinary walks of life.*"*

If there be any way in which it is possible for the hand of power to afford *protection* and *encouragement* to *mis-rule*—to mis-rule in *all* its branches—it is surely this: *viz.* the threatening with the vengeance of the law all such as shall do any thing towards holding it up to public view; and towards this end, whether any thing, which it is possible to do by the exercise of judicial power, has been left undone, let *this* doctrine, together with the *sentences* with which in other prosecutions it has been followed up, declare.

But the persons, at whose instance and for whose protection these sacrifices were made—these sacrifices of public welfare to private convenience—were a junto of "*great*" *characters*"—some learned, some unlearned—"*placed*" (but whether *well* or *ill* let him pronounce to whom liberty and imprisonment are matters of indifference) "*placed,*" at

* The King *v.* Cobbett. Cobbett's Register, 2d June, 1804, p. 853. Charge given to the jury by Lord Ellenborough, Lord Chief Justice.

any rate, some how or other, "*in high situations*?" and, in the instance of some of these *great characters*, how urgent the demand was for this sort of sacrifice, will, at the peril of imprisonment, appear in another place.

CHAP. VIII. The Exchequer Packing Office suffices.

KEEPING the liberty of the press, as it were, in a state of constant *annihilation*, (if the expression may be allowed) being thus, among persons "in high situation," in these days of unexampled purity, the common object—the one, and almost the only one, in the attachment to which the agreement is among them constant and almost universal—come we now to the convenience afforded by the chief jury-packing office for so necessary an operation.

By the chief jury-packing office I mean, on this occasion, *that* one of the seven* which has for its Master Packer the Deputy Remembrancer of the Exchequer. To this distinction the title of that office is rendered incontestable by two considerations:—1. The *permanence*, and thence the operations of which it is the result, are, in the instance of that office, avowed by *the judge*, and defended by him *upon principle*. 2. The number of juries thus nominated in that office is equal to little less than that of all the juries nominated in like manner in all the other offices put together.

* I embrace this opportunity of correcting a mis-statement, the cause of which lies, in some measure, in my present inability to supervise the press: a mis-statement, which though, with reference to the argument, altogether an immaterial one, might perplex the reader by the inconsistency it presents, if not set right.

When, in p. 27, (with allusion to the sort of business done by Taleyrand under Napoleon) I designated these Master Packers by the appellation of *Grand Electors*, and with the number *six* before them, it was in pursuance of a false recollection, which, at that time, represented the number of Prothonotaries as no more than two.

In the note in p. 38, beginning Courts, *three*: after "King's Bench and Exchequer," the word *Common Pleas* was left out: and in place of the words "*in the former*," should have been *in each of the two former*. And in conformity to this enumeration, in the text, in lieu of "*six*," the number should have been *seven*.

The proposition to be proved is—that though the Exchequer—the judicatory to which this office belongs, is not itself the judicatory in which the operation of crushing the liberty of the press is carried on, yet, for the purpose of that operation, the system of package, and the collection of permanent special jurymen which compose the produce of that system, are no less effectually sufficient, than if the scene of the chief part of the jury-packing business were an office immediately under the judicatory in which the business of crushing the liberty of the press is carried on.

On this head little remains but to recapitulate. Here may be seen the grand *House of Call* for *Guinea-men:* here the *Receiving-house* in which the recruits are *enlisted:* here the *Parade* on which they are *drilled:* here the grand *Muster-roll*—the *select and secret qualified list*—on which they are *entered:* here the *Register-office*, in which their "*connections*," &c. and thence their qualifications, are registered, and accordingly enquired after by all lips to which the information can be of use.

But why (it may still be said) lay so much emphasis on the Exchequer? If the Exchequer has its two Master Packers, has not the King's Bench as many?

Yes: but in the Exchequer, the permanence, which but for actual packing could not have place, is, as hath just been mentioned, irrevocably *confessed*, or rather *professed:* in the King's Bench no such avowal can be produced. It is in the Exchequer alone that the main body of this corps being in constant service, it is there and there alone that, with certainty, and without effort, the trust-worthiness—the degree of discipline—of each member is known to the whole staff.*

To this office therefore it is that in case of need, (when a libeller, for example, is to be punished for calling a man, in "*high situation*," by his father's title, or for questioning his *fitness* for his office) a *solicitor to the Crown* would send his order—saying, *pick me out a good dozen for King's Bench service.*

Oh—but all this—so far, at least, as concerns King's Bench, and libel law—is but mere surmise; the work of audacious imagination. *In the Exchequer, be it as you say: but in the*

* Special Jury causes, in a year, in the Exchequer, 84: In the King's Bench, crown side, but 15. Phillips, p. 159.

King's Bench no such packing can be proved; no such *purposed selection ever yet took place. There, at least, all is* simplicity: *there, all is purity.*

Thus far my objector. But, could even any such *negative* be demonstrated, still the reasons for the pulling down of all jury-packing offices—for the complete abolition of the *Guinea-trade*—for the disbanding of this *standing army*—this *noble* army, not of *martyrs* but of *martyrizers*—would not lose any thing of their force. Down to *this day* nothing of the kind has been done. Be it so: but why? Becaue down to *this day* nothing of the kind has been necessary. Come *to-morrow*, and the necessity may come along with it: and so sure as the *necessity* of the practice comes, so sure the practice comes along with it.

Convenience—slight convenience—has long since sufficed to establish the practice in *one* judicatory, the *Exchequer:* and the united forces of *self-preservation* and *vengeance*, will they not, in case of *need*, suffice to establish the same practice in the *King's Bench?*

In the *King's Bench*, as well as in the *Exchequer*, the officer, whose practice is thus open to suspicion, actually exists: by him the selection is actually made—made in every individual instance: by him, whether he will or no, a certain quantity of information, relative to the characters and dispositions of the individuals, out of whom he has to choose, is possessed. Thus much is matter of notoriety: and the only proposition, liable to be made a question of, is—whether, in the view of gaining additional information, it be likely that, in case of *need*, he or those whose interest in the business is more immediate—for example, in a state libel case—*the solicitor of the crown*—will seek for it at the hands of the correspondent officer of that *other* court, in which the opportunities of obtaining that sort of information are more *abundant.*

To such a question, can there be any other answer than this?—If, of the sort of information in question, there be, in the judgment of those whose interest it is that the judgment be correct, a deficiency in the *King's Bench*, to that *other court*, and that *office* in it which is best able to supply the deficiency, application will accordingly be made. If no such deficiency, then no such application.

But, if in the King's Bench there be no such *deficiency*, then so it is that, in the King's Bench, the mischief in question exists already in its full force.

In a cause in the Exchequer, inquiry at the hands of the officer by whom those jurors are selected, it is in the books of practice stated (we have seen) as being, on the part of the solicitor on each side, a *matter of duty*, regularly recurring and regularly fulfilled. That which, in the *Exchequer*, it is matter of duty to the *solicitor* to be inquisitive about, can it, in the *King's Bench*, be matter of duty to him not to know?

In the Exchequer, the permanence being, by the Chief Judge, avowed and justified, the *selection*—in a word the *packing*—without which the *permanence* could not have been established—is thereby avowed and justified along with it. Of the *matter of justification* which, in the judgment of the Chief Judge, is, in the Exchequer, so conclusive, is it credible that there should be any *deficiency*—and in a case of *libel law* too—in the *King's Bench?*

To confound social order—to destroy the characters of all public men—to defame the justice of the country—to bring Government itself into hatred and contempt—Conspiracy to do all this and more—necessity of defeating it:—Ferment raised by wicked and artful men—necessity of allaying it:—Respect for every thing that is respectable, on the point of being shaken off—necessity of fastening it on. All these topics—with a thousand others equally conclusive—all of them in such well-exercised and skilful hands—can they fail of furnishing argument enough, to justify the adopting, in *one* court, a practice, which, with so complete a success, has so long been established in *another?**

* Since the matter of the text was transmitted to the Printers, accident has thrown in my way a pamphlet, bearing date in 1794, and entitled, "A Vindication of the Conduct and Principles of the Printer of The Newark "Herald:...... by Daniel Holt, Printer of the Newark Herald." In page 19, I read, in form of a Note, a piece of history, which presents itself as not altogether inapposite to the present purpose. To any one, by whom any degree of credence is given to the statements contained in it, it will serve to prove two things: 1. That at the time in question, *viz.* anno 1777, no *Guinea corps* had, for *King's Bench service*, received as yet any such organization, as we have seen, and shall see again and again, a corps of that description and character to have received for *Exchequer service*: 2. That though *in the King's Bench, and for King' Bench service*, no such regular corps had been as yet put upon the establishment, a strong sense of the need which the service had of such a corps was entertained, and, in that Honourable Court, had accordingly found extra work for one of those *fiction-mints*, without which not one of all the Honourable Courts in Westminster-hall would hold itself competent to go through its business.

Were it possible that, for such *unction*, the cruise for example, of *Mr. Justice Grose's* eloquence should ever

The Note is as follows: the passage which it quotes is here inserted at second-hand, the original not being at present within reach.

" As the nature of forming *Special Juries*" (begins the note) " is not generally " understood, at least in the country, I shall make no apology for introducing the " following curious and interesting account of the manner in which they are se- " lected to the notice of my readers.—It is taken from the trial of *John Horne* " *Tooke*, Esq. for a Libel, in the year 1777."

" The Special Jury, (says Mr. Tooke) you may imagine are taken indiffe- " rently, and, as it may happen, from a book containing all the names of those " who are liable to serve; I thought so when I read the Act of Parliament ap- " pointing the manner in which they should be taken. But when I came to at- " tend to strike the special jury, a book with names was produced by the sheriff's " officer; I made what I thought an unexceptionable proposal. I desired the " master of the crown office (whom I do entirely acquit, and do not mean the " slightest charge upon) I desired the master of the crown office, that he would " be pleased to take the book, open it where he would, begin where he would, " at the top or at the bottom, and only take the first forty-eight names that " came. I said I hoped that to such a proposal the Solicitor to the Treasury " could have nothing to object. I was mistaken, he had something to object; " he thought that not a fair way (turning round to the Attorney-General) there " were witnesses enough present, and I should surely be ashamed to misrepre- " sent what eight or nine people were present at; he thought that not a fair way: " he thought and proposed as the fairest way, that two should be taken out of " every leaf; that I objected to, I called that picking and not striking the jury. " To what end or purpose does the law permit the parties to attend, if two are " to be taken by the master of the crown office out of every leaf? Why then " need I attend? two may as well be picked in my absence as in my presence; " I objected to that method; the master of the crown office did not seem to " think that I had proposed any thing unreasonable: he began to take the " names; but objected that he could not take the first forty-eight that came, be- " cause they were not all Special Jurymen; and that the names of common and " special jurymen were mixed together; and that it would be a hard case that " the party should pay the expence of a special jury, and not have one; that " they were expected to be persons of a superior rank to common jurymen; I " could have no objection to that provided they were indifferently taken. I said, " take then the first forty-eight special jurymen that come; he seemed to me " that he meant to do it; he began, but as I looked over the book, I desired " him to inform me how I should know whether he did take the first forty-eight " special jurymen that came, or not; and what mark, or description, or quali- " fication, there was in the book, to distinguish a special from a common jury- " man? He told me to my great surprize, (and he said he supposed I should " wonder at it) that there was no rule by which he took them. Why then how " can I judge? you must go by some method, what is your method? At last the " method was this, that when he came to a man, a woollen-draper, a silver- " smith, a merchant, (if merchant was opposite to his name, of course he was " a special juryman) but a woollen-draper, a silversmith, &c. he said they were " persons, who were working men of those trades, and there were others in a " situation of life fit to be taken. How then did he distinguish? no otherwise " than this: *If he personally knew them to be men in reputable circumstances, he*

fail—fail when addressed, if needful, to his own subordinate—addressed *in form* to none but the culprit libeller,

" *said he took them;* if he did not know them he passed them by. Now, Gen- " tlemen, what follows from this?

" But this is not all. The sheriff's officer stands by, the solicitor of the trea- " sury, his clerk, and so forth, and whilst the names are taken, if a name (for " they know their distinction) if a name which they do not like, occurs, and " turns up, the sheriff's officer says, 'O, Sir, he is dead.' The defendant, who " does not know all the world, and cannot know all the names in that book, " does not desire a dead man for his juryman. 'Sir, that man has retired.' " 'That man does not any longer live where he did.' 'Sir, that man is too " old.' 'Sir, this man has failed, and become a bankrupt.' 'Sir, this man " will not attend.' 'O,' (it is said very reasonably) 'let us have men that will " attend, otherwise the purpose of a special jury is defeated.' It seemed very " extraordinary to me, I wrote down the names, and two of them which the " officer objected to, I saved. 'I begged them not to kill men thus without re- " morse, as they have done in America, merely because he understood them to " be friends to liberty, that it is very true, we shall see them alive again next " week, and happy, but let them be alive to this cause.' The first name I took " notice of was Mr. *Sainsbury*, a tobacconist, on Ludgate-hill *The sheriff's officer* " *said, he had been dead seven months;* that struck me. I am a snuff-taker, and " buy my snuff at his shop, therefore I knew Mr. Sainsbury was not so long " dead; I asked him strictly if he was sure Mr. Sainsbury was dead, and how " long he had been dead. 'Six or seven months.' 'Why I read his name to- " day, he must then be dead within a day or two. For I saw in the newspapers " that Mr. Sainsbury was appointed by the City of London, one of the Com- " mittee' (it happened to be the very same day) 'to receive the toll of the " Thames Navigation,' and as the City of London does not often appoint dead " men for these purposes, I concluded that the sheriff's officer was mistaken, " and Mr. Sainsbury was permitted to be put down amongst you, Gentlemen, " appointed for this special jury.

" Another Gentleman was Mr. *Territt.* The book said he lived, I think, in " Puddle Dock, the sheriff's officer said '*that Gentleman was retired, he was* " *gone into the country; he did not live in town.*' It is true, he does (I am told) " frequently go into the country, (for I enquired.) His name was likewise ad- " mitted with some struggle. Now what followed? This dead man, and this " retired man were both struck out by the Solicitor of the Treasury, the very " men whom the sheriff's officer had killed and sent into the country were " struck out, and not admitted to be of the jury. Now, Gentlemen, what does " that look like? There were many other names of men that were dead, and had " retired, which were left out. There is something more unfortunate in the case " of a special jury. *The special jurymen, if they fail to attend that trial for* " *which they are appointed, are never censured, fined, nor punished by the Judge;* " in the trial of one of the printers, only four of the special jury attended. This " is kind in the Chief Justice, but it has a very unkind consequence to the de- " fendant, especially in a trial of this nature; for I will tell you what the conse- " quence is.—The best men and the worst men are sure to attend upon a special " jury where the Crown is concerned; the best men from a nice sense of their " Duty; the worst men from a sense of their Interest. The best men are known " by the Solicitor of the Treasury; *such a one cannot be in above one or two vir-* " *dicts; he tries no more causes for the Crown.* There is a good sort of man,

who for his better instruction in the art of *decorum*, is about to be sent to school for a few years at Dorchester or Gloucester—addressed *in form* to none but this one scholar, but moreover in effect to the Master Packer,† who is sitting under the Head Master all the while—were it in the nature of things, that such a fountain should run dry, is not the eloquence of *Mr. Bowles*, published and to be published, or even though it were *not* published, always at command?

Thus then, in respect of law and practice, in the field of *libel law*, and in respect of the *liberties* disposed of by it, stands the result. In a case (let us now return to abstractions) in which the personal interests and passions of the Judge, or of any of his *closest connections*, are most deeply affected, the selection of the individuals, by whom, in the character of *jurymen*, a *check* is *supposed* to be constantly applied to the power of the Judge, is as constantly in the power of the very person or persons, to whose power the authority of these assessors is *supposed* to operate as a check: and this, with the fullest and freshest information, not only

" who is indeed the most proper to try all this kind of causes; an impartial,
" moderate, prudent man, who meddles with no opinions: that man will not
" attend, for why should he get into a scrape? He need not attend; he is sure
" not to be censured, why should he attend? The consequence follows that fre-
" quently only four or five men attend, and those such as particularly ought
" not to attend in a Crown cause. I do not say that it happens now, not that I
" care; I do not mean to coax you, Gentlemen, I have nothing to fear, you
" have more to fear in the verdict than I have, because your consciences are at
" stake in the Verdict. I will do my duty not for the sake of the Verdict. Now
" what follows this permission to special jurymen to attend or not, as they like
" best? Why every man that is gaping for a contract, or who has one, is sure
" to shew his eagerness and zeal."

Thus far the speech of Mr. Horne Tooke, anno 1777, as quoted from his trial in Daniel Holt's pamphlet of 1794.

Turning to a pamphlet bearing date the present year 1809, and entitled, " Re-" port of the Trial in an Action for a Libel, contained in 'A Review of the Por-" traiture of Methodism:" tried at Guildhall, before the Right Hon. Lord Ellenborough, and a special jury, Saturday, March 11, 1809, I read in the Charge of the Lord Chief Justice, a passage, from which an inference, though of itself certainly not a conclusive one, may be thought to arise, that in this line of service the advantage of *permanence* is not more fully understood, and experienced in the *Exchequer*, than it is already in the *King's Bench*. " As to the measure of damages" (concludes his Lordship) " it is so entirely and properly in your " province, *and you are so in the habit of exercising your discretion upon these* " *subjects*, that I shall not say a word about it."

Thus far the Lord Chief Justice. The functions of special jurymen had therefore, it should seem, become *habitual* to the Gentlemen to whom he was addressing himself, and *that* to his Lordship's knowledge.

of their characters and circumstances in every respect, but also of their disposition in relation to *this*, as well as all other points of judicature, that come under their cognizance.

If this statement be correct, what are *jurors*, in all such cases, but mere *puppets? Jury trial*, but a solemn indeed, but disastrous *puppet-show?* The Judge, but *showman*, who, with the intervention of a system of machinery more or less complicated, moves the wires: the Judge, who in the sort of case, in which his interests and passions are most deeply affected, is in effect Judge, sole Judge, in his own cause.*

I spoke of *decorum*. Yes, it is for breaches of decorum that, under a judicatory thus constituted, libellers (and who is there that is not a libeller?) have so recently been crushed by punishments of such unexampled rigour: for a libel on the *King*, imprisonment for two years: for libels on Judges (and let not the climax pass unnoticed)—for libels on Judges, parties and judges in their own cause—imprisonment for three years with *et cætera*:—imprisonment to the destruction of livelyhood in a scene of secluded penitence.† Nor let this be

* That, for the purpose of enforcing obedience to his own judicial orders, he ever *has been so*, and, (subject always to eventual check from some still higher tribunal) ever *ought to be*, is most indisputable: hence the *practice* and *propriety* of *attachment for contempt*.

In Lord Mansfield's reign, under the convenient *laxity* of the word *contempt*, an attempt was made to extend procedure by attachment to the case of a *libel*, when directed against a Judge. The *nerves* of *Lord Mansfield* failed him: that project was abandoned. At present, whatsoever other wants may be supposed, of *nerves* at least there is none. But, so long as juries are what, according to *Exchequer doctrine*, they not only *are* but ever *ought to be*, to what use should a project so full of trouble, if not of hazard, be revived?

† That on the propriety of this *climax* a judgment may be formed, let the following brief observations be considered:

1. In the whole field of government, there is not an abuse which could not, without any reflection on the personal conduct of the King, be laid completely open, and receive its correction: in the particular field of judicature, there are few, if any, abuses, that could be fully brought to light, without reflection, in some shape or other, upon the personal conduct of the Judge.

2. The King, let *him* conduct himself as he may, cannot, while the constitution stands, be removed or suspended; at least not without the concurrence of *both* Houses of Parliament: a Judge, if *he* misconducts himself, may be removed, on an address, by *either* House of Parliament. Canvassing the personal conduct of the *King* has therefore a mischievous tendency, without any useful one: while canvassing the personal conduct of a *Judge* has, on the other hand, a useful tendency, without any pernicious one. To the prejudice of a Judge, whatever is said, has, even if it be *false*, *this* good effect—*viz.* that it applies to his conduct the only efficient check of which *in practice* it is susceptible—

unremembered—*viz.* that, in the most *recent* of those cases, *perseverance*—perseverance in this novel track of rigour—is announced.*

But, under libel law as it stands—and, now that the punishment awaiting a delinquent is understood to be thus destructive, can you really regard it (it may be said) a probable event, that a special jury of *Englishmen* (who cannot, all of them, be supposed to be regardless of *English liberties*) *will persevere in pursuing a course which, in your view of it, would be so completely destructive of English liberties? For—admitting that, under the influence of a sinister interest so constituted, obsequiousness will carry a man a* certain *length, it follows not by any means that, to the sinister effect of such influence, there should be absolutely no limits. Even from persons thus unhappily exposed to temptation, can depravity, such as that would be, be seriously to be apprehended? In English bosoms* is there no *such sense as* a sense of shame . . . .?

I answer—that, to destroy the *de facto* liberty of the press, as completely as the *de jure* liberty of it has for ages been destroyed, there needs not any sort of conduct, to which any such word as *depravity*, or any thing like it, is wont to be applied:—in a word, that there needs not, on the part of any one individual breathing, any thing which any man can reasonably be expected to be ashamed of.

But, for the reader to be the more effectually impressed with the truth of this proposition, *three* other matters of fact present themselves as necessary to be borne in mind.

1. That, with libel law in its freshest state—the state in which it is declaredly ready and about to be enforced—enforced by punishments, the rigour of which has just been brought to view—the existence of a *de facto* liberty of the press, in any sense in which it is capable of operating as a check to misconduct in any shape on the part of public

the attention of the public eye.—*Two* years imprisonment for a libel on the King: *three* years imprisonment, with *et cœteras*, for a pair of libels on a pair of Judges!

* *Observer, May* 7, 1809. "*May* 6, 1809. In the Court of King's Bench, 'George Beaumont, the printer and publisher of a Sunday Newspaper, was 'sentenced *for a libel on the King* to be imprisoned *two* years in Newgate, to 'pay a *fine of* 50*l.* and find securities at the expiration of his imprisonment for 'five years—himself in 800*l.* and two sureties in 200*l.* each. Mr. Justice Grose, 'previously to passing sentence, declared that from the *frequency* of this of-'fence, it became necessary to punish it with exemplary severity."—Two years is not more but less than three years: but in the two years case it was *only the King* that was libelled.

men, is perfectly incompatible: I mean if the intentions, declared as above, be, with any tolerable degree of steadiness and consistency, pursued.

2. That, by the mode in which Judges are *in use* to *direct*—and, without exposing themselves to reproach or so much as complaint, may for ever *continue* to direct, juries, it is rendered difficult, to a degree of hopelessness, for a jury, without setting its face, in a stile of marked opposition, against the opinion of the judge, to avoid convicting a man as for a libel, be the paper of a sort ever so necessary to the preservation of English liberties.

3. That, the fixation of the *punishment* not lying within the province of the jury, no consideration grounded on its *magnitude*, can operate in such manner as to afford, to the publisher of any, the most meritorious composition, any chance of acquittal at their hands.

A small sample of libel law, in its freshest state, will form the business of the next chapter.

CHAP. IX. Instruments for crushing the Liberty of the Press.

§ 1. *Doctrines and Rules.*

A VIEW of libel law *as it is*, confronted with a view of what *it ought to be*, is destined for a separate publication: slight indeed, and consequently imperfect and inadequate, is the only view that can be given of it here. But, without something under this head, of the most fatal of all the effects of the packing system—of that, in comparison of which all others put together are as nothing—not any even the slightest conception could have been conveyed.

Even the slight sample or two, which have incidentally presented themselves, may have been sufficient to induce a suspicion, and that not a light one—that the treatment which, under the notion of *law*, has been given—and at this moment is ready to be given—to the press is, if persevered in with any tolerable degree of steadiness, incompatible with every *political*—not to say moral—use of it.

A fundamental sophism, from which every other rule, doctrine, or maxim, draws its mischief, is one that, from

having never been announced in words, is not the *less*, but the *more*, mischievous. It consists in confounding on this ground *demand for punishment* with *demand for disapprobation:* or, what comes exactly to the same thing, assuming, that the *one* being established, the *other* follows of course. "Is this *proper?* Is this *decent?* Is this *endurable?*"—ask the orator—reinforcing at every step the intensity of the disapprobation, which the appeal thus made to the passions is calculated to call forth: at the same time, in whatever degree, if in *any*, that hostile sentiment be actually called forth, verdict of *guilty* is the verdict, the necessity of which is thus constantly *assumed*, and which by the delusive force of the assumption is but too constantly produced.

Reducing this notion to a determinate *proposition*, with a correspondent practical *rule*, let us add to it a few others, expressive as far as they go, of the actual state of libel law: stating, under the head of each, the documents from which it has been deduced. Taken together, they will suffice, it is apprehended, to establish—and with a degree of evidence sufficient, at least, to the present purpose—that, under libel law *as it is*, *prosecution* and *conviction* are the same thing: and that, when a political libel is the offence, the *form* of *jury trial* is but a melancholy farce.

1. A written and published discourse is *a libel*, and every person who contributes to the communication of it, punishable in respect of it, if there be to be found in it any passage or passages, the *tendency* of which is, in any degree, to expose *government*, i. e. any member or members of the governing body, considered in that character—to "*disesteem*." *Rule*—Punish whatever tends to bring a man in power into "*disesteem*."

2. —— or, in relation to any person in any *high situation*, affording any *inference*, representing him as *ill-placed* in it, and questioning his *fitness* for it. *Rule*—Punish whatever imputes unfitness to any man in office.

3. —— or which has had, or has tended to have, any such effect as that of "*prejudicing*," "*hurting*," "*injuring*," or "*violating*," the "*feelings of any individual:*" more especially if his "*situation*" be a "*high*" one. *Rule —Punish whatever hurts any body's "feelings."*

4. In any written and published discourse, whatsoever passage constitutes just cause for *dislike*, constitutes just and sufficient cause for punishment. *Rule—Punish whatever you dislike.*

As to the *grounds* of these doctrines and these rules—*viz.* the grounds relied on as constituting the warrant for regarding the *doctrines* as having by competent authority been *delivered*, and the *rules* as being by like authority about to be *pursued*, they are taken from the Report, as published in *Cobbett's Weekly Political Register*, for the 2d of June, 1808, of the Trial in the cause, entitled, "*The King against Cobbett:*" being an Information filed *ex officio* by the Hon. Spencer Perceval, his Majesty's Attorney-General, against the defendant, "for publishing, in the Weekly Political Register, "of the 5th of November, and the 10th of December, "1803, certain Libels upon the Earl of Hardwicke, Lord "Lieutenant of Ireland; Mr. Justice Osborne, one of the "Judges of the Court of King's Bench in Ireland; and "Mr. Marsden, Under Secretary of State for Ireland: on "which Information the defendant was tried in the Court of "King's Bench, at Westminster, on Thursday, the 24th of "May, 1804, before the Lord Chief Justice, Lord Ellen-"borough, and a special jury."

The words of the several passages quoted are copied from that Report.

N. B. This libel is the same, on account of which Mr. Justice Johnson, Judge of the Court of Common Pleas, in *Ireland*, was afterwards, to wit on the 23d of November, 1805, convicted in the character of the *author*, on a trial at bar, in the Court of King's Bench *in England*.

§ 2. 1. *Rule, concerning Disesteem.*

PROOF *of the Rule.*—Ch. Justice, p. 854. "IT is no new "doctrine, that if a publication be calculated to alienate the "affections of the people, *by bringing the government into* "*disesteem*, whether the expedient be *ridicule* or *obloquy*, the "person so conducting himself is exposed to the inflictions "of the law. It is a *crime*. It has *ever* been considered as "a crime: whether it be wrapped up in *one* form or another. "The case of the King *v.* Tutchin, decided in the time of "Lord Chief Justice Holt, has removed all ambiguity from "this question."

Thus far the Lord Chief Justice. While these pages are writing, persons out of number are amusing themselves with rendering what, I hope, appears to themselves, at least, good service to the country, by complaining of *abuses*,

which *to them* appear as if existing in the government of it: and, to *some* at least of these persons, these abuses appear to have swelled to such a magnitude, as that nothing short of an alteration in the mode of representation in Parliament, can operate as a sufficient remedy. Have or have not such proceedings, and such publications, a tendency not only to "*bring the government into disesteem,*" but "*to* "*alienate the affections of the people*" from something or other, for example, from a Parliament composed as at present? If yes, and if, to any person so occupied, it should happen to cast an eye upon this page, I would beseech him to ask of himself whether a cell in *Dorchester* or *Gloucester* jail be or be not a *fit* abode for him—to consider whether he be in a state of *fit* preparation for a visit of some years length to either of those theatres of *lawful* reform—and in what manner accommodation may in the most convenient manner be provided, in those or some other boarding-houses of the same class, for himself and the quantity of company whom he *ought* to have there.

Another hint to reformers—Among the situations at the disposal of this noble and learned teacher of the arts of decency and candour—situations, the profit of which helps to constitute that part of his Lordship's remuneration which is composed of patronage, is one, which in 1797, produced from 1,200*l.* to 1,300*l.* a year,* part of the profit of which consists in the letting of lodgings, for which it is part of his Lordship's occupation to provide lodgers. Amidst the demands, which the execution of the law thus delineated would, if executed with any thing like impartiality, be productive of, for accommodations in this and other such schools of reformation, would not forecast suggest the endeavouring to secure some of the most convenient of these lodgings by a suitable retaining fee?

§ 3. 2. *Rule, concerning Feelings.*

PROOFS.—Ch. Justice, p. 854. 1..... "By the law of "England there is no impunity to any person publishing "any thing that is *injurious* to the *feelings*, and happiness of "an individual."....

* Finance Committee of 1798. Rep. 27, p. 164-5.

2. *ib.* "If a man publish a paper, he is exposed to the "penal consequences, as he is in every other act if it be "illegal; and *it is illegal* if it tends to the *prejudice* of any "individual."

3. *ib.* .... "The question for your consideration is, "whether this paper is such as would be *injurious* to the "individuals, and whether," &c.

4. P. 858. "It has been observed, that it is the right "of the British subject *to exhibit the folly or imbecility* of "the members of the government. But, Gentlemen, we "must confine ourselves within limits. If in so doing *in-"dividual feelings are violated*, there the line of interdiction "begins, and the offence becomes the subject of penal visi-"tation."

5. *ib.* "If you are of opinion that the publications are "*hurtful* to the individuals or to the government, you will "find the defendant guilty."

On putting together these passages, all out of the same speech—out of the same *charge*, and that not a very long one—it seems evident enough that if they mean any thing, they mean this—*viz.* that it is a *crime* for *any man* to write any thing which it happens to *any other man* not to *like*: or more shortly, that if a man publishes what he writes, under Lord Ellenborough at least, *it is a crime to write.* For, what published book was ever *written*—and, being written, *read*, in which somebody or other has not found something or other that *he did not like*:—in *plain* language, that he did not *like*; or, in the language of *avenging sentimentality*, that was not "*injurious*," "*prejudicial*," "*hurtful*," or "*violational*"—add, for further enrichment of the language, *vulnerary* to him or to his feelings?

And how am I to know whether what I am writing and meaning to publish, will, or will not, meet with any man to whose "*feelings*" it will be "*injurious*," and so forth? Why, by his prosecuting me or *not* prosecuting me. And if he prosecute me, what will be the consequence? Why, that I have committed a crime, and must be convicted of course: for if his taking upon himself the expence and vexation of carrying on a criminal prosecution, be not a proof that his feelings have been injured, prejudiced, hurt, or violated, nothing else can be. Therefore, as already observed, admit but this doctrine to be *good* law—(and, coming from the source from which it comes, how can it be

otherwise?)—*prosecution* for a libel is in every case *itself* evidence that the paper prosecuted for *is* a libel, and that evidence is *conclusive*.

The *criterion*—it must be confessed—the criterion thus afforded, is an extremely simple one. No man can fail—or, at least, no man can *long* fail—to know, whether he *is* or is *not* under prosecution. If then, for any thing that I have written I am not yet prosecuted, what I have written *is not* as yet a libel: if, for any thing in that way, I am already under prosecution, then it *is* a libel. Such being the criterion, to the noble and learned inventor nothing—it may well be presumed—can be more satisfactory. But to us without doors, who are as yet out of jail, and who, if we did but know how, had rather continue at large than be locked up in one, is there any and what course left open, for learning at any earlier point of time, whether this or that article, which it would be satisfactory to us to see made public, will or will *not* be productive of an effect which to *us* would be so serious a one.

A high sheriff, for example, or other chairman, of a county, or other meeting, in which a set of *resolutions* are voted, imputing either "*folly or imbecility*," or *corruption*, to any of those Right Honourable persons to whom those qualities, or some of them, have of late in one or other meeting of that sort been now and then imputed—any such presiding character, though not a "*great character*," wishing to give to these *resolutions* a certain degree of publicity, and at the same time not wishing to pass his time in a *prison*, though it were for no more than *three*, or even for no more than *two* years—what is he to do?

For knowing what, on a given occasion, a man's *feelings will* be—or rather, and to come somewhat closer to the point, what on that occasion *he will declare* his feelings to be—I know of one course and but one, which is—to put the question to himself. On this principle, to save circumlocutory description, I will venture to submit to the consideration of such Gentlemen as it may concern the form of a *Note*, which, short and simple as it is, may, it is humbly hoped, be found to be not the less well adapted to the purpose.

Circular.

Mr. —— or Sir —— presents his respectful compliments to *Lord Castlereagh*, and begs the favour of being informed, whether the "*exhibition*" of his Lordship's *folly* or his

Lordship's *imbecility*, or his Lordship's *corruption*, should it take place, would be "*prejudicial*," "*hurtful*," "*injuri-*" *ous*," or "*violational*," to his Lordship, or to his Lordship's "*feelings*." The like to the Right Hon. Spencer Perceval, &c. &c. &c.

To any such chairman, who, though not a "*great charac-*" *ter*," will, at any rate, be a *distinguished* one, should it happen to be apprized of the qualification which from certain exemplifications (whereof presently*) that have been given of the magnanimity of the said Mr. Perceval, may *by implication* be understood as being allowed to be *in a certain sense*, and *under certain restrictions*, capable of exempting a man from the lot to which a liberty of this nature would otherwise so justly doom him—should it happen to him accordingly, to be capable of making the proper responses to the catechism formed by that no less *religious* than *high-born* and *high-seated* gentleman—and in particular to his grand Latin question *Quo patre natus*—wrapping himself up in Mr. Perceval's virtue as if it were his own; what may also happen to him is—to turn aside with disdain from this humble but well-meant endeavour to save him from what it may happen to him not to like. But whatsoever may happen to be the security, real or imagined, of a person so distinguished, the resource may not be altogether beneath the attention of those who, like myself, belong to the undistinguished herd: I mean the printers who propose to *print*, the booksellers who propose to *sell*, any such resolutions, as well as the *readers*, to whom in reading of them it might happen not to take sufficient care to keep their *tenor* and *purport* to themselves.

§ 4. 3. *Rule, concerning unfitness in high Situations.*

Ch. Justice, p. 857. After having, on the occasion of a sentence, mentioned above, undertaken, as above, to enumerate the "*libels*" contained in that one sentence, coming to that which in this list happens to occupy the second place—"He admits" (says his Lordship, speaking of the libeller)—"he admits this noble person" (Lord Hardwicke) "to be celebrated for understanding the modern method "of fatting a sheep, as well as any man in Cambridge-

* See Ch. XI. § 2

"shire."—"Now, Gentlemen," continues the Lord Chief Justice, "what does this mean? Does it not clearly mean "to *infer*, that Lord Hardwicke is ill-placed in his *high* "*situation*, and that he is only *fit* for the common walks of "life?"

Thus far the Lord Chief Justice.—Among the persons just spoken of as being suspected—and surely not altogether without apparent cause—of endeavours used to bring the government into disesteem, I have observed some, by whom declarations have been made, expressive of an opinion—and that too pronounced still more "*clearly*" than in the way of "*inference*"—that *Lord Viscount Castlereagh*, and the now *Right Honourable Spencer Perceval*—the same Right Honourable person whom we then observed officiating, we have seen how, in the character of his Majesty's Attorney-General—as being respectively somewhat "*ill-placed*" in one of their "high situations." After passing eighteen months in prison for one of the two libels thus uttered, and made public, the libellers, of whom I am speaking, are they prepared to pass another eighteen months, in the same place and condition, for the other of these same libels?

Being a man that writes, or even though he be but a man that thinks—whosoever prefers liberty to imprisonment, safety to destruction, "*let him think of these things.*"

"*To doubt the fitness of him whom the Sovereign hath chosen,* "*borders near on sacrilege.*"

Such is the rule laid down by some learned Law-Lord, Chief Justice of the Emperor's Bench, in the time of the Emperor Justinian—"*Sacrilegii enim est instar, is quem Im*-"*perator elegerit, an dignus sit dubitare.*" *ff.* 9. 29. 3.

Of the constellation of "great characters" in "high situations," by whom the rule thus copied, and those others that match so well with it, have been called for and *laid down*, let any one who dares, and who (to use the words of the Lord Chief Baron) "*thinks it worth while*," say—that they, or any of them, are "*ill-placed*" in, or "*unfit*" for, those their respective situations.

Thus much however may be a question—though alas! it is but a speculative and barren one—whether, for their own feelings at least, they are not, more particularly some of them, rather unfortunately *placed* in point of *time*. In England, in these our days, at this early part of the 19th century, their "*feelings*" are forced to content themselves with comparatively scanty gratifications: gratifications, such as may be

afforded, for example, by the spectacle of a Judge driven off the Bench, and a few years—as yet no more than a few years—imprisonment bestowed upon a few paltry booksellers.

And without seeking to send them or any of them so far back, as to those imperial times from which this rule of their's was with so much fidelity transcribed, or even of those of our own first Defender of the Faith, who even without the benefit of the Act called, in the newspapers, sometimes the *Cutting Act*, sometimes *the Ellenborough Act*, enjoyed in the course of his life the deaths of no fewer than 70,000 of his subjects in the character of criminals—had the noble and learned godfather of that law been as free to choose the *time* as he is the *place* of his *circuits*, would not the *western circuit*, anno 1685, have been a choice more congenial to "*feelings*" such as his—than any *circuit* can now be in these degenerate days, *ubi pro duritie temporum*, as the learned anatomist so feelingly laments, *vivos homines dissecari non licet*: when, in plain English, such is the hardness, such the ferment of and in *the times*, that men cannot be found to be cut up alive for the amusement of learned eyes: so that noble Lords and Honourable Gentlemen, who have a *taste for torture* (understand for witnessing it not for feeling it) are reduced to content themselves with such inferior yet never to be parted with gratifications, as the agonies of bulls, dogs, cats, and horses can afford.

§ 5. 4. *Rule, concerning Dislike.*

FOLLOWS a list of *qualities*, which, on the supposition of their being to be found in a discourse of any kind, have been stated as being of a nature to excite, in the breast of any person, by whom it is heard or read, a sentiment of *disapprobation* or *dislike*: the existence of which sentiment has, by the Chief Justice of the King's Bench, or by the Attorney-General, with the concurrence of the said Chief Justice, been stated as constituting a sufficient warrant for pronouncing such discourse (it being consigned to writing) *libellous*, and for punishing with any number of years imprisonment, besides other punishments, every person who, in any way, has contributed to the communication of it.

1. *Want of fairness.* 2. *Want of liberality.* 3. *Flippancy.* 4. *Deviation from decency.* 5. *Unbecomingness.* 6. *Impro-*

priety. 7. *Slanderousness.* 8. *Ill-nature.* 9. *Want of candour.* 10. *Tendency to ridicule.* 11. *Contradictoriness—viz.* with reference to matter of opinion advanced by another person.

Follow now the correspondent passages serving as grounds of this *doctrine*—proofs of the existence of the corresponding rule.

It cannot with *reason*, and therefore, it is presumed, it *will* not be expected, that, on the occasion of every one of these *qualities*, either the Chief Justice, or, under his allowance, the Attorney-General, shall, in precise logical form, be seen exhibiting, and re-exhibiting to the jury, an argument in any such words as these—*viz.* this quality exists in the discourse in question—the quality, and, in respect of it, the discourse will be regarded by you with *disapprobation* or *dislike*—therefore, in consideration of such disapprobation or dislike, even although the discourse should be found to contain no other passage in it, having the effect of exciting, in your breast, the like sentiment, you will regard yourselves as *bound* to join, in pronouncing against the defendant, the verdict *Guilty*.

That such, throughout, was their intention, may surely be regarded as placed sufficiently out of doubt by the following considerations:—

The *purpose*, and *sole* purpose, for which, on that occasion, the defendant was brought before the Jury, was—that it might be ascertained, whether, in respect of the discourse in question, he was, in the character of a *libeller*, *guilty*, and as such *punishable*. In any other view than that of contributing to *this* effect, had any thing been, either by the Chief Justice or the Attorney-General, said of the discourse in question, it would have been *irrelevant:* and not merely irrelevant, but *insidious* and *injurious;* having, for its object and tendency, the causing a man to be convicted, as if it were criminal, on account of a portion of discourse which, in their own opinions, was *not* criminal. Not but that, on several of these occasions, the passage taken for the subject of animadversion is, in *express* terms, pronounced, by one or other of these official persons, "*a libel*" or "*libel*-"*lous:*"—and since, in this respect, no line of distinction is drawn between any *one* of the passages so animadverted upon, and any *other*, it will surely not be regarded by any body, as a question open to dispute, whether, among all these several *qualities*, and all these several corresponding *passages*,

there were *any one*, in respect of which it was not part of the design and endeavour, of the official persons in question, to cause the passage to be by the jury reputed *libellous*, and the defendant dealt with accordingly in respect of it.

The *qualities*, successively ascribed to the various parts of the *printed discourse*, and, in respect of which, it is supposed to be the design and endeavour of the *spoken speech*, to cause the *discourses* to be considered as *libellous*, are hereinafter designated and introduced by the words *quality* or *qualities*.

The passages respectively adduced to serve as proofs, that, on the occasion of each such respective *quality*, such was the design, and endeavour, are designated and introduced by the words *proof* or *proofs*.

I. QUALITIES. 1. *Want of fairness*. 2. *Want of liberality*.

PROOF. Attorney-General, p. 827. " Now, Gentle-" men, is there any thing in all this that can be called a "*fair* and *liberal* description of a public character..... ?

II. QUALITIES. 3. *Flippancy*. 4. *Deviation from decency*.

PROOF. Attorney-General, p. 827. " Gentlemen, I have " already adverted to the *indecency* and *flippancy*, of many " expressions made use of in this libel. If this libeller had " been hurried away with the temptation of saying a flippant " thing, *I* should not have thought it a subject of crimi-" nal prosecution. But, in the case before you, it is *cri-" minal*, as indicating the *spirit* with which it was written, " and as being descriptive of the *mind* of the man at the " time he was making them. I would not, however, be " understood to say, that even in the warmth of discussion " upon public men and public measures, *decency* of language " *ought not* to be preserved, and that *any deviation* there-" from is not *punishable*... ." [Here the doctrine in question is directly avowed: by the Attorney-General avowed, and by the Chief Justice never contradicted: *viz.* that for every written discourse to which a deviation from decency can with propriety be imputed, a publisher is punishable.]

III. QUALITIES. 5. *Unbecomingness*: and again *Flippancy*.

PROOF. Attorney-General, p. 828. " Surely no one who " has the least *liberality of feeling*, could think it *becoming* " to *taunt such a gentleman as Mr. Addington*."' [Taunt him, *viz.* by naming him by his father's title.] P. 828, " I " again say, that for any publication calling Mr. Adding-

"ton *Doctor Addington*, or any *flippancy* of that nature, "*standing by itself*, *I* should think it *beneath the dignity* of "that Right Honourable Gentleman to make it the subject "of a prosecution." N. B. *Beneath* his *dignity* only, not *above* his power. Learn we hence, that if at this moment, there exists out of a jail any such person as a newspaper editor, or a political writer, on any other than one side, it is owing to the joint magnanimity of "*such a gentleman*" *as Mr. Perceval*, and "*such a gentleman*" *as Mr. Addington.*

IV. Qualities. 6. *Impropriety* (as intimated by the word *ought.*) 7. *Slanderousness.* 8. *Ill-nature.*

Proof. Attorney-General, p. 829. After speaking of divers passages in which Lord Hardwicke had been spoken of as being "*a good father*, *a kind husband*, *fond of litera-* "*ture, and agricultural pursuits*—" "Qualities like these," (continues he) "*ought* to have made the libeller pause, be- "fore he ventured to attack such a character." . . . . . "Gentlemen, you must shut your eyes—if you do not see "that these amiable qualities are attributed to Lord Hard- "wicke, with a *slanderous*, with an *ill-natured* meaning."

V. Qualities. 9. *Want of candour.*

Proof. Attorney-General, p. 830. "Will any man "believe that there is any degree of *candour* in saying, that "all that has been done by the British government for Ire- "land, is to send them a sheep-feeder from Cambridge- "shire, and a strong-built chancery-pleader from Lincoln's- "Inn, *when I tell you* that . . . . Ireland . . . . is defended," &c. &c.

Learn we hence, that whatever "*degree of candour*" there may happen to be in any given discourse, it is in the power of the Honourable Spencer Perceval (but whether in his character of Spencer Perceval, or in his character of Attorney-General, *that* we are left to learn as we can) at any rate in the power of somebody—and the safest conclusion seems to be, in the power of any and every man that is in power—to *divest* the discourse of such its *candour*, and thereby subject the author and publisher of it to punishment: and this by so easy a process as "*telling*" the jury any thing that shall have the effect of a contradiction to this or that part of the discourse.

On this head, not a particle of Mr. Attorney-General's law, howsoever objected to (as we shall see) by the defendant's counsel,* is dissented from by the Chief Justice: on

* See Chap. X.

the contrary, from what immediately follows, let any man judge, whether by implication at least—by necessary implication—it has not, the whole of it, been confirmed.

VI. QUALITIES. 10. *Tendency to ridicule.*

PROOF. Chief Justice, p. 849. Upon the above and other passages, the observation of the defendant's counsel (*Mr. Adam*) had been, p. 842, that " if the doctrine so laid " down were admitted . . . . the freedom of discussion, re- " lative to public men and public measures, would de- " pend—not upon a point of right, but upon the *taste* of " the Attorney-General:" and that " the controul which the " Attorney-General is" (thus) " desirous of putting upon it " (the liberty of the press) would go to extinguish it for " ever," p. 842.

" Ridicule," he had afterwards contended, p. 849, " is " a weapon which may be fairly and honourably employed, " especially when it is in the true spirit of English humour, " and for an object purely of a public nature." After speaking of the nick-name of *Carlo Khan*, formerly given to *Charles Fox*, and the print of a colossus, comprehending all Scotland within the stride of its patronage—when, after adducing these examples, he goes on to say, " Lord Hard- " wicke is again represented as devoted to agricultural pur- " suits," . . . . he finds himself thus interrupted by the Lord Chief Justice—

" Do you maintain that *a person has a right to ridicule his* " *neighbour?*"—Mr. ADAM. This is an information for a *public libel*, and not for private ridicule. LORD ELLENBOROUGH. " I suppose you have some authority. I do not " wish to restrain your arguments, but it is a doctrine " which *never was, and never can be, maintained.*"

VII. QUALITIES. 11. *Contradictoriness; viz.* when manifested, in terms of a certain degree of strength, towards some proposition or propositions, that have been advanced by some one else. [N. B. In the instance in question, it was a mere matter of *opinion*, relative to the *state of the nation:* not any *specific matter of fact.*]

PROOF. Chief Justice, p. 856. Afterwards, in his *charge*, speaking of one of the sentences in the paper, his Lordship says, p. 856, " Now the *libels* in this sentence " are these"—thereupon, coming to one of them, he proceeds and exclaims—" Is it to be *endured*, that it should be " said of *any* person, but more especially of a person *sitting*

"*in the capacity of a Judge*, that he had *poured a broad-*
"*side upon the truth of the fact?*" N. B. Sitting in the capacity of a Judge. Yes: so the Judge in question, Mr. Justice Osborne, was: but *how?* not *hearing a cause*, but *haranguing* upon *politics*.

The disapprobation excited by this expression, in the bosom of our Lord Chief Justice, was, it seems, of such a strength as to be past *endurance*. A similar, if not exactly equal, sentiment is what he assures himself of finding prevalent, in the bosoms of the *jurors*, (the Guinea-men) to whom he is addressing himself: and on this sentiment it is that he relies as sufficient of itself to entitle him to expect, at their hands, a verdict of "Guilty," enabling him to subject the victim to any number of years close imprisonment in a scene of solitude.

The word "*fiction*" will of itself suffice to satisfy any person, who can *endure* to look into Blackstone's Appendix, with the corresponding chapters, in this view, that in the universal scramble for fees, of which the jurisdiction of the Westminster-hall courts in its present state is the result, the war was carried on in no other manner, and by no other *arms*, than by *broadsides*, which then were, and still continue to be, "*poured upon the truth of facts*." If then any thing like consistency were to be expected among persons in such "*high situations*," so far exalted above all need of consistency, and all fear of shame, long ago would every man, who has ever vended, or in any other way contributed to the dissemination of the contents of Blackstone's Commentaries, have been prosecuted by the *Honourable Spencer Perceval*, and convicted, as of course, by one of Lord Ellenborough's juries.

Signing a notorious falsehood—is this pouring a broadside upon fact? If so, is there a *term*, in which broadsides are not poured upon facts by hundreds, not to say thousands—poured by the very hand of this very Judge, (with fees for the same) or to his profit, and under his orders?

By the smoak of these *broadsides*, have not the paths of judicial procedure been converted into—what they were meant to be converted into—a *jungle*, penetrable to the eyes of tygers, impenetrable to the eyes of suitors, who, such of them as do not perish in it, are dragged through it?

Before he was what he is—this noble and learned Lord Chief Justice—was he not an Advocate? Does not the occupation of an Advocate consist in *pouring broadsides upon*

the truth of facts—of whatsoever facts are set up for him as a mark by the attorney, who brings him his brief with this or that number of guineas marked on the back of it?

Was not he a Special Pleader? Knows he not what a *sham plea* is?

The distinction between the cases in which falsehood is either *allowed of*, or *compelled*, and those in which it is *made punishable*, had it *ever*—has it *to this day*—any better object, than the enabling well-paid marksmen to *pour broadsides upon the truth of facts?* (*Scotch Reform*, Let. 1. Device 10. *Mendacity-licence.*)

What *is endurable*—yes, and *endured*, and with as much complacency as if *vice* were *virtue*, and *falsehood* necessary to *justice*, is—that, by these *guardians of public morals*, *broadsides* should be poured without ceasing—*poured upon the truth of* facts:—what is *not endurable*, is—that they should be *told* of it.

Decency and *candour!* What important words! How necessary is correctness to the conceptions which it may happen to a man to have annexed to them!—What is there that does not depend upon it? Open one *Report* more, which shall be quoted presently, and you may see the whole fabric of English liberty hanging upon the import of these two sounds. Note well the fineness of the hair: observe well the thinness—the mathematical thinness, or rather phantasmagorical tenuity of the *partitions*, which at this hour divide liberty from thraldom. Observe how pleasantly the hair, if not sufficiently cut through *already*, may be cut through at any time; nobody, but those employed in cutting it, knowing or caring any thing about the matter.

Campbell's Nisi Prius Reports, Easter Term, 48 Geo. 3. 1808, p. 359, Rex *v.* White, and another, London sittings after Easter Term, 48 Geo. 3. Before Mr. Justice Grose.

Information (ex officio) "by the Attorney-General against the proprietor and printer of a Sunday Newspaper, called *The Independent Whig*, for a libel upon Mr. Justice Le 'Blanc, and the jury before whom the Captain of a Mer-'chant Ship had been tried for murder at the Old-'Bailey.....'

"Grose J. said *it certainly was lawful with* DECENCY *and* 'CANDOUR, *to discuss the propriety of* the verdict of a jury, 'or the *decision of a Judge;* and if the defendants should 'be thought to have done *no more* in this instance, they

would be entitled to an acquittal: but on the contrary they had transgressed the law and ought to be convicted, if the extracts from the newspaper set out in the information contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into *hatred* and *contempt* the administration of justice in the country."

" The defendants were found guilty on this and a similar " information, and sentenced to three years imprisonment." Thus far the Reporter. The similar information was for a similar libel on Lord Ellenborough, the Lord Chief Justice.

You, to whose imagination any such imprudent fancy should at any time present itself as that of taking for the subject of free " discussion," under favour of any such licence, as above, the " *decisions*," or the conduct of an English " *Judge*," would you know whether the expressions that have presented themselves to your pen are consistent with the rules of " *decency and candour?*" Go to the house of penitence at Dorchester or Gloucester—repent there for three years, or any such increased number of years, as for the allaying of the increasing ferment, shall have been deemed necessary*—repent, and when your course of penitence has there been run through, perhaps even at the commencement of it, when beyond hope of mercy it has by your sentence been announced to you, then it is that you will be informed, and know all that it is intended you shall know. And what is that? Not by what means those rules may, *in all cases*, be *observed*, but by what means, *in one instance*, they have been violated.

Behold then, in the King's Bench, the *royal school of decency:* a school, the discipline of which has however this to distinguish it from ordinary schools—for example, from the other royal school within view of it—*viz.* that whereas in *Dr. Carey's* school, instruction comes first, and then, in case of transgression, if the transgression be wilful and perverse, perhaps correction afterwards, stripes, say half a dozen—in *Lord Ellenborough's* school, *correction*, or peradventure, under the name of correction, *destruction*, comes first; and it is from this correction or this destruction, that, for the first time, and without the possibility of learning it

* See above, Chap. VIII. p. 89. Speech of Mr. Justice Grose, in *The King against Beaumont.*

from any other source, or at any earlier period, the scholar derives the satisfaction of learning how he ought to *have* behaved himself.

§ 6. *Terror, issuing from the Darkness of the Doctrines.*

If, by competent and acknowledged legislative authority, and in and by any *determinate assemblage* of *determinate words*, such as are the words of every *act of parliament*, maxims, even such as those that we have been seeing, were consigned to writing and *established*—established though it it were in these very words—the very words that we have just seen—the condition of Englishmen would be a condition of security, in comparison of what it is at present.

But by no such authority, in no such determinate form of words, has this part of the rule of action as yet been, or will any part of it ever be, established and *fixt*, that Judge and Co. are able to prevent from being thus fixt.*

Under such *law*—(the abuse here made of the term *law* must be tolerated, for it is inevitable)—under such law, security may be talked of, and even fancied, but, for any man who either publishes a newspaper (not to speak of pamphlets) or contributes to the communication of its contents, security *itself* cannot, with truth, be said to have existence. Thus much for actual *danger*.

Now as to alarm—terror—the inseparable consequence of opinion of danger, on this as on every part of the field of law, in which the legislator—dupe or accomplice of Judge and Co.—has refused to act, *fear* makes *law*, as among the heathen it made *Gods*.†

The *Lord Chief Justice of the King's Bench*—would he think this "*decent?* becoming? proper?"—would he "*endure*" it? Might not his "*feelings*" be "*hurt*," wounded,

* When, on any part of the field of law, the security of the subject is at its *lowest*, then it is that the delight with which it is contemplated by learned eyes is at its *highest* pitch.

Accordingly libel law, such as we have been seeing it, having, in a very high place, been but t'other day brought to view, absolute perfection was declared to be among the number of its attributes. Declared? and by whom? This is of the number of those things which it may be rather more easy to learn than safe to indicate.

The sincerity of a class of men, half whose lives are employed in the exercise of high-rewarded insincerity, has found itself now and then exposed to doubt: but here at least there need be none.

† Primus in orbe Deos fecit timor.

"violated," "prejudiced," or "injured" by it? Mr. *Attorney-General*—Mr. *Chancellor of the Exchequer*—The *First Lord of the Treasury*—any of the "*great characters*"—their *high situated* connections—any one of these exalted persons, to whose ear, a rumour concerning any part of the *contents*, or of the *supposed design*, of this or that passage in my projected pamphlet, should happen to have found its way, may it not happen to them or any of them (Mr. Attorney-General excepted) to intimate as much to Mr. Attorney-General; in which case prosecution *may*, and, if prosecution, *conviction* and *perdition will*, to a *certainty*, be my doom. To publish or not to publish? to write or not to write? Of this sort will be the question, which, under the darkness visible at which we have been taking a glance, any man, into whose mind any such speculative, theoretical, and jacobinical, conception, should have entered, as that of attempting to bring to light any *abuse*, the theatre of which is to be found in any part of the system of *judicial procedure*, will of course be tormenting himself. The answer will be determined—partly by the *incidents*, which *chance* has presented to his notice, partly by the strength or weakness of his *nerves*.

In this state of law, bribery excepted, among those which concern the administration of justice, exists there that enormity which a Judge—I mean an English Judge, one of the legislating twelve—by *committing* or even by *confessing*, would expose himself to any the slightest danger—I do not say of *punishment*—the supposition would be too extravagant—but so much as to any expression—any the faintest expression of regret—such as majorities know so well how to frame—that it had not been otherwise? Confessing would he obtain credence?

Not long ago comes out a *Newspaper*, announcing a series of Letters, to be addressed to the Lord Chief Justice of the King's Bench:—letters, which were to have presented to his Lordship's notice abuses upon abuses, the scene of which was to have been laid in his Lordship's court, or in which at any rate practitioners in that court were to have been represented as actors. In the character of an introduction, the first of the announced letters crawls out:—no other follows it. Whence this sudden death? That which history refuses to disclose, must be supplied by another hand. Between the first letter and the day which *should* have brought forth the second, in the hour which *should* have been that of repose, the pillow of the publisher re-

ceives a shake, the united curtains separate, and behold! at the bed's feet a grimly spectre—wrapt up in clouds of artificial hair, ill-concealing the streams of gore which are seen issuing from wounded feelings. In its uplifted hands is displayed a terrific scroll, exhibiting a plan and elevation of each of the two lately consecrated abodes of sequestered penitence, with MENE TEKEL and UTRUM HORUM in flaming capitals, garnished with fragments of sentences, about *contempt of government, high situation, et cætera,* and so forth, scrawled upon the walls.

After such warnings—and where is the literary pillow that is not visited by them?—suppose for argument sake—and it is only for argument sake—suppose Lord Ellenborough to have done any of those things which *Lord Macclesfield,* or even any of those things which, alas! *Lord Bacon,* did before him—suppose him to have squeezed *Clerks* as Lord Macclesfield did *Masters:*—suppose him, like Lord Macclesfield, to have sold places under himself which it belonged to him to check—or (supposing it moreover unlawful)—suppose him, instead of selling them to a disadvantage, to have listened to the suggestions of a more improved economy, and pocketed the whole profit in the lump.

Suppose—but what end would there be to *such* suppositions?

In such a state of things, among those elected Guardians of Justice, if any such there be—to whom economy, so displayed, and on such a theatre, would appear a fitter object of *reform* than *imitation* or *confirmation,* is there any one that would *hear* of it?—Is there any one that, *in print at least,* would *tell* of it?—Not unless a situation in Gloucester or Dorchester jail—and that a *safe* and *permanent* one—safe as *safe-custody* could make it—permanent as a *lease for years* could make it—had become the object of his choice.

This then is among the *effects*—and is it not among the *uses*—not to say the *objects*—of *libel law?*

The purity of the Bench an article—a fortieth article—in the creed of Englishmen:—orthodoxy, on this ground, even where unpaid, universal.—Yes: but behold the *cause* of it.

Such being the bar opposed to beneficial discovery by universal terror, suppose it broken through at all, by *whom* will it have been broken through? By the candid, the cor-

rect, the moderate? Possibly;—should haply these virtues be found at any time in company with almost unexampled fortitude. But how much more likely, by the uncandid, the incorrect, the violent? Vices like these, when exemplified in the supposed libel, have they or have they not any such effect as that of enhancing the mischief, if any, which is liable to be produced by it? The answer is not altogether clear: but, at any rate, it is on the supposition of the affirmative, that the proportions, generally given to the intensity of invective, seem to be grounded.

But it is *truth*, not violence, that has been the *real* object of terror and hostility, to the creators and preservers of English *libel law:* and thus it is, that while, under the spur of indignation and desperation, violence and exaggeration, burst forth, Truth—gentle and simple *Truth*—remains at the bottom of her *well*, without daring to peep out.



CHAP. X. WANT OF ADEQUATE OBSEQUIOUSNESS MORALLY IMPOSSIBLE.

§ 1. *Unobsequiousness found unavoidable by a veteran Advocate.*

IN any published written discourse, taking for its subject the propriety of *public* measures, or of the conduct of *public* men, whatever merits *disapprobation*, presents an *adequate demand* for *punishment*. This principle being either expressly laid down or assumed, and juries habituated to accede to it, and *act* in conformity to it, it seems not very easy to conceive what that published discourse can be, to which, if written on any such subject as that in question, a jury, even though it were not a draught from the *select and secret qualified list*, would, on any tolerable ground of probability, be expected to refuse to attach a verdict of conviction. Yes: if so it be that, in the alledged libel that lies before them, there be not one of them that can find an expression or a word which he feels himself disposed to disapprove: *viz.* neither on any such score as *decency*, or *liberality*, or *candour*, or *propriety*, and so forth, as above:—and what if he can not? Only that in that case, for supporting a

verdict of conviction, then some *other* ground must be looked out for, of which, while such doctrines as have just been seen are acceded to, whether it be possible there should be any deficiency, the reader may now judge.

If, in the event of his entertaining in relation to any passage thus brought under his review, any such emotion as that of *disapprobation* or *dislike*, it would afford to his feelings any *gratification* to be contributory to the subjecting the delinquent to punishment, in such case, whether a juror will not find, in these established doctrines, an amply sufficient *warrant*, for the affording this gratification to the irascible part of his frame, may be seen already.

But, whether inclined or not inclined, will it be in his *power* to avoid it?—In his *power? physically* or *metaphysically* speaking, yes;—but, to keep clear of metaphysics and every thing that ends in *—ism*, *practically* speaking—whatever be the state of a juryman's inclinations, can there, for any proposed writer on *politics* or *legislation*, which is as much as to say for any proposed *libeller*—can there be any rational hope or prospect, of witnessing, on the part of any such juryman, any such forbearance?

The degree of probability in question cannot, it is evident, but be, in a high degree, influenced, even if not in one event converted into moral certainty, by the mode of address pursued by the directing Judge: by the degree of *freewill* which it may please this creator to have left or not left to his habitually obedient creatures. To learn if possible a thing so necessary to salvation, let us open the book of *history*, that in it we may behold the words of *prophecy*, and read in it the eventual doom that is in store for us.*

" * Report of a trial at bar of the Hon. Mr. Justice Johnson, one of the Jus-
" tices of his Majesty's Court of Common Pleas, in Ireland, for a libel, in the
" Court of King's Bench, on Saturday the 23d day of November 1805. Taken
" in short-hand by T. Jenkins and C. Farquharson, London, 1806:"—being the same libel of the publication of which Mr. Cobbett had been convicted as above.

Extracts from the charge given to the jury (a *special one*) by Lord Ellenborough, Lord Chief Justice.

1. P. 117. " No question is made as to the publication itself being a libel
" nor indeed *could* any question be agitated upon that subject. . . . . "

2. P. 117. " There can be *no doubt in the world*, but that it is a very *gross*
" and *scandalous* libel. . . . . "

3. P. 117. " No question has been made with regard to its libellous tendency;
" if it had been raised, *you could not have hesitated one moment.*"

4. P. 121. " If you believe this to be the hand-writing of Judge Johnson, *you*

"No question is made" (says the Lord Chief Justice) "as "to the publication itself being a libel:"—the fact is incontestable, but the *cause* what can it have been? The enquiry is a curious one: and in the answer may be seen a confirmation of the moral impossibility of any verdict other than that of guilty at the hands of a jury of Guinea-men, not to say of any men, so *directed*.

On the trial of the *other* defendant, in regard to some parts at least, if not the whole, of this multifarious libel, a "*question*" of this sort had, as we have seen, been made: made, and by the same learned Gentleman, who after having been leading counsel for the political writer, officiated now in the same character for the culprit Judge. The question having been made *then*, how comes it not to be made *now?*

On that *former* occasion the authority which the learned counsel had to contend with, was no other than that of a *single* Judge: on this *present* occasion, the authority before which he has to plead, is that of the entire judicatory:—a judicatory, composed of four Judges, of whom the Judge in question, though in authority the *Chief*, was in number no more than *one*.

"Do you maintain that a person has a right to ridicule "his *neighbour*. . . . ?"

In the Report given of this trial the *words* pronounced by the noble and learned Lord Chief Justice, are *reported*, or *professed* to be reported, by the reporting scribe:—the *tone*, the *countenance*, the *deportment*, by which the interruptive interrogation was accompanied, *were not*—any of them—nor *could* they have been—included in the report.

Whatsoever was the cause—whether an acquaintance with the persons and dispositions of the Guinea-men to whom the defence would have been to be addressed—a consciousness that under such *direction* obsequiousness was a virtue not confined to the jury-box—or a casual deficiency of nervous power, such as learned advocates for liberty, no less than the unlearned, are liable to—or that, even where there is nothing *dangerous*, there is something *unpleasant*, and to polished feelings, *grating*, in kicking against the pricks, and pressing against the *feelings* of official superiors, whose

"*will have no question to decide*, as to the quality of the publication, but *you* "*will find him Guilty*."

Such are the words, *as taken in short-hand*, of the Lord Chief Justice.

countenances are day by day to be encountered—so it is that there being, according to the learned counsel's own statement at least, nothing more at stake than "the liberty of the press"—that liberty which, as he had observed, "has "ever been held as one of the first principles of the con-"stitution"—nor from the doctrines, against which, on that former occasion, he had with so little fruit been contending, any worse effect to be apprehended, than the extinguishing of "that liberty for ever"—whatsoever may have been the cause of the abandonment, so it is that before this re-inforced, and *de jure* at least superior, judicatory, the contest was not renewed.

§ 2. *On the Part of a trained Juryman, unobsequiousness still more hopeless.*

BUT, if such was the no-resistance made by a sturdy veteran—possessing too, in the plea of professional duty, an excuse such as might have been expected to disarm resentment, call forth sympathy, and edulcorate feelings in the bosom even of the most obdurate Judge—what, under such direction, could have been or ever can be—expected, for the relief of a defendant libeller, or for the preservation of the about to be "extinguished liberty"—what, I ask, can, to any such purpose, be, with any the least colour of reason, expected, from the firmness—let us not say of the craving Guinea-man, who, in one unacceptable verdict, beholds the extinction of the race of his expected guineas—but of any gentleman habituated (as by the discipline of the Blackstone school all gentlemen are habituated) to regard in every word that cometh from the mouth of one of the reverend and learned twelve, the rule of legal faith—the unerring standard of rectitude?

CHAP. XI. SUCH JURIES WORSE THAN NONE.

§ 1. *Star-chamber preferable to a covertly-pensioned Jury.*

TO a mixt tribunal containing, along with the Judge, a Jury thus constituted, and thus directed, *two other* tribunals,

each of them more simple in its composition, might, in cases of libel law, so long as libel law stands as it is at present, *viz.* without any determinate set of words for the expression of it, be substituted (it should seem) and with no inconsiderable advantage to liberty and justice.

1. One of them is—a *Star-chamber:* in a word the antient judicatory of that name, revived, with or without amendments.

It was in *that* judicatory, that libel law, as it stands at present, received its *form and tenor: viz.* in so far as *form and tenor* can be attributed to a species of law—*viz. unwritten*, alias *common*, alias *Judge-made* law—of which the essential character is the not having any *tenor* at all belonging to it, nor consequently any *purport* of any such solidity as that *certainty* and *safety* can be built upon it. It was in that judicatory that the *earliest* cases extant—being those which, in the character of the foundations of libel law, are continually referred to—were determined.

Of that transcendent judicatory, the acknowledged fruit of which was "the keeping of all England in a state of "quietude," pure of all fermenting matter, one great advantage was the being composed altogether of persons in "*high situations*"—"*great characters*"—whose greatness, so long as it pleased the fountain of all greatness, was placed out of all danger of failing, being fixt by office.

Though, under *special jury* law, it *does* belong to the defendant to choose, out of 48 persons fixt by a very different choice, by what 12 he shall *not* be tried, it does *not* under any law belong to a defendant to make choice of any of the Judges by whom he *shall* be tried. But, for my part, supposing for argument sake, that it rested with my choice, more willingly would I be *tried*, and (being of course *convicted*) *sentenced*, by a Star-chamber composed of the same great characters as heretofore, than, under such direction, tried before a jury, of whom it should happen to me to know thus much and no more—*viz.* that they were *so* appointed and *so* paid:—a sentence all the while awaiting me from such a source, and of such a nature, as, by the examples that are under every body's view, has been rendered so intelligible.

In the case of the libel in question—the libel composed of the letters signed *Juverna*—the "*great characters*," mentioned in the title of Mr. Cobbett's trial as objects of that libel, are "the Earl of Hardwicke, Lord Lieutenant of

"Ireland; Lord Redesdale, Lord High-Chancellor of Ireland; Mr. Justice Osborne," (the alledged "*pourer of broadsides*") "one of the Judges of the Court of King's Bench in Ireland; and Mr. Marsden, Under-Secretary of State for Ireland."

To these may be added—as so many persons, over whose wrongs a veil had been drawn, partly by their own magnanimity, partly by that of "the Attorney-General of our present Sovereign Lord the King, who for our said Lord the King was then and there in that behalf in his proper person prosecuting," (and on such an occasion what more proper prosecuting "person could there have been?") *viz.* "the Honourable Spencer Perceval"—"*the Hobarts*" (meaning doubtless the then *commonly* called Lord Hobart, now *properly* called Earl of Buckinghamshire)—"*the Westmorlands*" (meaning the then and present Earl of Westmorland)—"*the Camdens*" (meaning the then and present Earl Camden)—and the then *Right Honourable Henry Addington*, now Viscount Sidmouth, and in the said libel so "unbecomingly taunted" by being called by the title of his father "*Doctor Addington.*"

The purpose for which this constellation of great characters is here introduced is no other than that of saying, that, it being, by the supposition, my *misfortune* to be under prosecution for a libel against all those several great characters—and at the same time my *advantage* and *privilege* to have, for my trial and sentence, the choice of a *Star-chamber*, in lieu of a jury so constituted and directed as aforesaid—my choice would be in favour of the said *Star-chamber:* and this, even supposing the constitution of it to have received this—I know not whether to call it *confirmation* or *amendment*—to wit, that of its being composed, in the character of *Judges*, of the very same persons, neither more nor fewer, as those whom, by the hypothetical and argumentative mention thus made of their names, it may, for aught I know, at a time when *to write* is *to write libels*, have already happened to me to have libelled.

Neither caprice nor rashness dictated the choice thus made.

Judging thus openly and avowedly in their *own* cause—executing the operation of *conviction* and *punishment*, at the same *time* and with the same *hands*—this *apparent*, as well as *real* union, of functions, at present so erroneously *supposed* to be disjoined, would be sufficient to point towards

them the attention of the public eye: weak as every check must be, the action of which is to be conveyed up into so high a sphere, some check, and that a *real* one, they would have: whereas, in the existing case, while the phantasmagoric vision of a check displays itself, of the reality no signs have ever yet been visible.

§ 2. *A Jury-less Judge preferable to a covertly pensioned Jury.*

2. THE other sort of judicatory to which, in my own case, as above, in comparison with a jury so constituted and directed, I should not hesitate to give the preference, is a single-seated judicatory, consisting of a Judge, without a jury: and this, even without excepting the noble and learned Judge, under whose direction *the jury-box*, for the reasons already so distinctly stated, would, in my mind, oppose so insuperable a *bar* to *Hope*.

To those, if any such there be, to whom an object of such inconsiderable importance as the actual state of judicature, when delineated by so obscure a pen as the present, may have already presented itself to view, the considerations by which, in the character of *reasons*, (*See Scotch Reform*) this choice is dictated, will, if not already brought to view, at any rate be sufficiently apparent—it being, *in one word*, of the nature of *responsibility* (in the *burthensome* sense of the word) to go on *diminishing ad infinitum*, in proportion as the *number* of those who are sharers in the burthen is *increased*: not that if the same learned Judge, by whom the jury would, in the case supposed, be directed, and of course directed to convict me, I could, *as far as conviction goes*, entertain any rational expectation of any better fate. But, the fate of the defendant being, in the case supposed, placed so *manifestly* as well as completely in his hands, what in that case I should hope for, is—some mitigation in the rigour of my sentence. Not that by the non-existence of a jury—not that by a circumstance so completely foreign to the consequences and tendency of the offence—any defalcation could be made from the *real* demand for punishment: but that, in some way or other, more readily felt than described, the like effect might, in some degree, be produced by prudential considerations.

You have had a fair trial: you have been tried by a jury:

by a jury composed of your equals and fellow subjects: you have been convicted by that jury. . . . . In this strain runs regularly the eloquence, by which, when a convict is about to receive his doom, in an oration addressed in form to his *own*, but in design to other the surrounding *ears*, (not to speak of *pens*) intimation is given to *him*, that is to *them*, to recognize the justice of it.

In this way it is, that the satisfaction, whatsoever it be, which it is the lot of the upstart "*censor*"* to afford, by his suffering, to the injured excellence of "great characters" placed in "high situations," is enjoyed without abatement: while, of any dissatisfaction that may chance to be raised by it, a portion more or less considerable is turned aside upon the *jury-box*, the inhabitants of which find, in the

* Conclude we now with the catechism—the *Perceval* catechism—already glanced at.

"Gentlemen, (p. 839) who is Mr. Cobbett? Is he *a man of family* in this "country? . . . . . *Quis homo hic est? Quo patre natus?*—He seems to ima-"gine himself a species of *censor*, who, elevated to the solemn seat of judg-"ment, is to deal about his decisions for the instruction of mankind."—Speech of the Hon. Spencer Perceval, in his character of Attorney-General, leading counsel for the prosecution, in the trial of Mr. Cobbett, as above.

Who Mr. Cobbett *is*—was to this *man of family* a matter, even at that time, not altogether unknown, and is somewhat better known at present. What he is *not* is—one who having secured to himself some 12 or 13,000*l.* a year of the substance of the people—raised, *not* by taxes, but by means, in comparison of which the most *oppressive* of taxes would be a *relief*—has made it as completely his *interest*, as this prosecution, with the doctrines which it afforded occasion to promulgate, have proved it to be his *endeavour*, to contribute what may be in his *power*, towards destroying whatsoever remains undestroyed of the liberty of the press.

Quis homo hic est? Quo patre natus? So long as the name of this man of family is remembered, this latinity brought forward on such an occasion—ought never to be forgotten. Two casts of men in this country: *men of family*, to whom, in case of delinquency, *impunity* is due: men of *no* family, to whom, in the like case, *punishment* is due. One cast, who have a right *to plunder*: another cast, who have a right to *be plundered*, and to be *punished* if they *complain* of it.

Was it not by the original edition of this catechism, more than by any thing else, that the French Revolution, with its horrors, was produced?

And here we see one use of a *special*, and *well-selected* jury: men ennobled by the "*Esquire*" tacked by the constable to their names. With a pedigree reaching down, though it were from *Woden*, is it possible that the united force of pride and vanity should so completely have got the better of common prudence, as to represent the question *guilty or not guilty*, as turning upon the question *family or no family*, had it been to a jury of the *original*, the *constitutional*, the *ungarbled*, the *uncorrupted* stamp? Did ever man think to better his cause, by "*violating*," in this or any other way, the "*feelings*" of his Judge?

constitutional darkness in which their operations have been involved, an effectual protection against all assaults to which visible objects stand exposed.

Were it my lot to be tried for a libel—a lot that may fall to me at any time, as well as to every other man in the country, who can either write or read, and whose endeavour is to afford, in any shape, he being not a man of *family*, "*instruction to mankind*,"—I had rather, a hundred times over, be tried by Lord Ellenborough, sitting alone in his proper place whatever it might be, the King's Bench, the Star-chamber, or the Privy-chamber—by Lord Ellenborough without a jury—than by a jury trained under the direction of, as well as directed by, Lord Ellenborough. By tears, by prostrations, by a certain quantity of dust licked up, by intercession of friends, by vows of good behaviour, and other et cæteras of penitence and humiliation, it might *then* happen to a man to find "*feelings*," where feelings, other than those which are but springs of vengeance, are not *now* to be found, and where, except of that sort, the printers of the Independent Whig found none.

But suppose me prosecuted, and, before such a jury, of course convicted, what would be then the language—"Fool," or "weakest man that walks over earth with-"out a keeper—what would you have? You have been "tried by a jury of your country: you have been con-"victed. There! go and write libels, if you can do it "within four walls, without communication from without, "in the well ordered jail of Gloucester, for six years: for "three, as is proved by your transgression after the ex-"amples you have had before you, are not sufficient." Who, in a word, who had to stand fire from an adversary, would not rather have the adversary *before* a screen than *behind* one?

PART II.

STATE OF THE PACKING SYSTEM,

ANNO 1808.

CHAP. I. INTRODUCTION—TWO REFORMING SHRIEVALTIES.

§ 1. *Turner and Skinner, anno* 1783-4.

IN the year 1784, *Sir Barnard Turner*, and *Mr. Thomas Skinner*, *(See City Characters)* the late celebrated auctioner, afterwards Alderman of London, finding themselves *Sheriffs of London* and *Middlesex*, charged as such with *duties* of no inconsiderable importance, conceived what to many grave and learned persons of that time, friends to social order and our holy religion, was looked upon of course as a theoretic and speculative fancy; *viz.* that of making things "*better* "*than well,*" by applying their minds to the fulfilment of those same *duties*. The state of things appertaining to that department having presented itself to their eyes as being in divers particulars susceptible of improvement, they made in that view what arrangements had occurred to them as being in their own power, and in a tract of forty 8vo pages*—gave an account of what they had done themselves, together with a statement of such other things as, if done by others, presented, in their view of the matter, a prospect of being of use.

* The title of it is—" An Account of some Alterations and Amendments at-" tempted in the Duty and Office of *Sheriff* of the County of *Middlesex* and " Sheriffs of the City of *London*, during the Sheriffalty of *Sir Barnard Turner*, " and *Thomas Skinner*, *Esq.*—London: Printed by Stephen Clark, No. 15, " Brokers Row, Moorfields, 1784." No Bookseller's name

In addition to some regulations, partly executed partly recommended, having for their objects the *health* and *good behaviour* of prisoners, the changes thus spoken of under the name of "*alterations and amendments*," consisted of three innovations, one respecting the disposal of *goods* taken in execution in civil actions, the two others respecting the *place* and *mode* of putting criminals to *death*.

1. On their entrance into the shrievalty they had found lodged, by customary negligence, in the hands of the sheriffs' officers, a class of men, whose hearts are universally recognized as standing, in a peculiar degree, exposed to the inroads of hard hardness and corruption, the function of nominating persons, at whose disposal, in the name and character of *appraisers*, *goods* taken in *execution* were regularly placed by these their patrons: and of the general result of this arrangement a tolerably adequate conception may be formed from *one* individual case, in which, according to the report given of it by these sheriffs, the value of the property so taken, being about *five* times the amount of the debt, and the whole having been taken from the debtor, no more than a *tithe* of it, *viz. half* the amount of the debt, had found its way into the pocket of the creditor; the other nine-tenths, having, in some regular and established, but unascertained or at least undivulged proportions, been shared between the minister of justice, and his official nominee and associate above-mentioned.

To this grievance the remedy they applied was one which though, in principle, and in the character of a regularly established remedy, applicable by all persons, on all occasions, not altogether an unexceptionable one, proved, in the individual hands in question, there is reason to think, a beneficial one: the nomination which they had found, as above, in the hands of their officers, was taken out of those low-stationed and impure hands, into their own: and forasmuch as in that station men are not only too highly and conspicuously elevated, but moreover too frequently changed, to be much in danger of engaging with success in the organization of any regular plan for the extraction of lucre from so impure a source, the mischief if not altogether eradicated must naturally have been considerably diminished.

On what footing the matter stands at present, it has not fallen into my way to learn. At that time, as the evil genius of the discarded functionaries would have it, both sheriffs were *upright* as well as public-spirited men: and *Skinner*,

being, in relation to the branch of business in question, in a pre-eminent degree an *intelligent* one, knew where to find his *like*.

At present the magnificent edifice, now erecting in the center of the city under the name of the *Auction* Mart, presents the idea of a more radical cure.

2. On the ground of capital punishment, the *place* and *mode* of execution furnished to these reformers two other opportunities for casting their honest mite into the treasury of justice.

On those melancholy occasions, on which to save the trouble of reforming them, and adjusting punishment in quality as well as quantity to delinquency, malefactors of the most diversified descriptions are involved in one indiscriminating destruction, the operation was in those days regularly preceded (it seems not easy to say why) by a procession of two or three miles length, in the course of which, whatever effect could have been expected from the concluding tragedy was more than countervailed by the intervening disorders. Struck with the incongruity of this surplusage of loco-motion, our reformers fixed the ceremony to the well-assorted spot to which it remains attached at present: a spot immediately contiguous to the place of confinement from which the victims then used to be, as they still are, taken for the appointed sacrifice.

At that same time, the fatal operation being performed, as mechanicians say *by hand*, was performed in that coarse and uncertain manner, by which the sufferings of the patients were exposed to receive unintentional increase. It was to this happily associated pair of humble and unambitious reformers, that the machinery, now applied to that purpose, and still known by the almost burlesque but sole existing name of the *New Drop* owed its establishment. Under English justice, the intended object, as well as effect of it, corresponds exactly with that of the *Guillotine*, under the anarchical tyranny of revolutionary France. For, in the design of the humane, as well as scientific, inventor, whose name it has perpetuated, that instrument (a *French* edition of our *Halifax Maiden*) had no other object than that of diminishing, in each instance, the *suffering* produced by those executions, the *multitude* of which depended on other hands.

To any one who has been accustomed to observe how slow, in every department of government, from the highest

down to the lowest, the pace of reform is, and how thickly beset with obstacles the paths which it has to traverse, it may be apt to appear difficult to conceive by what strange accident, even in so low a sphere, a change, which had for its result, as well as for its object, the good of the many, should have been suffered to take effect.

As to the innovaticn which consisted in the disturbance given to the official arrangement, by which so quiet and regular a division had been made of the property of the debtor between the officer and the appraiser—in the fact of its having been suffered to take effect, and that too without opposition from above, he may behold a certain proof of two things, *viz.* 1. That there was no individual existing in any such station as that of a Judge or other considerable Law-officer, into whose hands so much as a single penny of the profit that used to be thus extracted was ever felt to have found its way; and that, in particular, if in the disposal of any of the property in question any *errors* were ever committed by any one of these inferior ministers of justice, no Chief Justice of the King's Bench had ever considered himself as having gained, or conceived himself as being in a way to gain, to the amount of 1,434*l.* 15*s.* 6*d.* a year, or any part of that sum, nor any Chief Justice of the Common Pleas 733*l.* 3*s.* 11*d.* a year, or any part of that sum, nor any Attorney-General *that* or any other sum, by contributing to the manufacture, or effecting or permitting the correction of any of these errors: 2. That neither did there exist among any of those exalted personages, any individual whose pride had found itself by any accident engaged in the protection of the abuses, or inconveniences thus removed.

3. As to the procession from Newgate to Tyburn, the thieves, whose practice found itself diminished by the abolition of this ceremony—these unlicensed depredators, not one of whom ever had or ever would have found any difficulty, other than from want of money, in his endeavours to purchase a toss up for impunity on pretence of some error, bearing no more rational a relation to his case than to that of the *first homicide*, found themselves unable in their conjunct capacity to make any such case as on the ground of precedent would, in point of decency, have warranted any gentleman of the long robe, in the character of Judge, Counsel, or Member of Parliament, to stand up in support of it.

4. As to the *New Drop*, the dying agonies, of the patients

destined to be relieved by it, not having found, in a long robe or in any high situation, any person possessing any such interest in their continuance, as is possessed by such a multitude of personages in high situations and long robes, in the continuance of the living agonies of so many thousands who are kept so regularly immured in forced idleness, by their authority and for the sake of their profit and their ease, and the only persons whose co-operation towards this reform was necessary, being the *Surveyor* and the *Carpenter*, whose sensibility to the advantages of it was beyond dispute; thus it was that *this* reform too found its way into existence unopposed.

In a word, barring opposition from superior power, accomplishment being within the power of the reformers themselves, and no interest intervening in any tangible shape to call down opposition from above, the reforms, such as they were, were carried into effect.

By these circumstances, when rightly considered and put together, the known facts of the case may be found to stand divested of that air of fable, by which, to a first glance, they may have seemed obscured.

§ 2. *Phillips and x.* *Anno* 1807-8.

FROM that year (1784) to 1807, Nature took time to rest herself: and, in all those three-and-twenty years, though of *abuse*, in a considerable variety of shapes, there could not, during any part of that time, have been any deficiency, it appears not that in the series of worthy and respectable gentlemen, who succeeded each other in that office, there had been so much as *one*, to whom the idea had occurred, of occupying himself in any such *theoretic* and *speculative* task, as the attempting to make any defalcation from the mass: no—not a thought about any such matter, in the breast of any one of the units in so many pairs of functionaries, any more than if instead of paying his 2,000*l.* or 3,000*l.* for the privilege of discharging the functions of his office, he had, like a pair of *Honorable Knoxes*, received his 10,023*l.* a year, or like an *Earl of Buckinghamshire*, his 11,094*l.* or like a pair of *Lord Seymours*, his 12,511*l.* or like a pair of *Percevals*, one behind the other, his 38,574*l.* ("*subject*" alas! to "*deduction*") for the trouble of bearing the official *title* of it: *practice* not being, in any part of all this time,

in any degree, or by any body, neglected—*practice*, to wit in *essentials*, such as going to court, riding about in a gilt chariot, giving and eating dinners, and the like.

Africa, in times of old, had the reputation of producing such singularities as could be exhibited on four legs. In modern times, England has among nations been noted for producing singularities on half the number of legs.

In the shrievalty year 1807-8, the spirit of reform having passed, as hath been seen, three-and-twenty years of repose on the pillows, or in the graves, of Sir Barnard and Mr. Skinner, made its appearance, in the character of a *Giant refreshed*, in the body of Mr. Phillips, a publishing bookseller of the first eminence, who, on receiving from his Majesty's sword the customary honour, changed his appellation into that of Sir Richard Phillips.

In the nature of the shrievalty there is a sort of *mystery*, in consequence of which he, who does not look well to his words, and even he who does, will be in continual danger of falling into one or other of two *heresies*, which, like *Scylla* and *Charybdis*, lie in wait for him, one on the side of *grammar*, the other on the side of *legal* and *curious learning*. In London and Middlesex, taken together, there is never *one sheriff* only, there are always *two sheriffs*. The same two respectable gentlemen who, in the City of London, constitute two sheriffs, and thereby two persons, constitute, in the County of Middlesex, but *one sheriff*, and thereby, in legal abracadabra, like man and wife, but *one person*:—or else *vice versâ*;—for, such is the frailty of unlearned memory, that as often as, in relation to this article, *one* minute finds me in possession of orthodoxical truth, the *next* minute finds me dispossessed of it.

In the artificial and involuntary fraternity contracted by him on this occasion, it was not the lot of Sir Richard to find any such felicity as that which had attended Sir Barnard and Mr. Skinner.

Bishop Burnet—or if not he some other self-reported eye-witness, whose name, if found, would not, to the *present* purpose, add much to the stock of our useful knowledge, tells us of a pair of *twins* whom he saw living in Holland, and whose misfortune it was to stand connected by bonds of fraternity closer by much than either of them wished; *viz.* by an adhesion of some sort or other, in the region of the back-bone, constituting thence, instead of *two bipeds*, *one* unfortunate *quadruped*.

At the age of about twenty, one person of this unhappily connected pair paid the debt of nature. The condition of the survivor is too deplorable to be dwelt on any where, especially in this place. All that is here wanted of him is to serve as a type of one half of our quadruped, or double biped *sheriff*.

In his pilgrimage through the thorny region of reform, Sir Richard was not long ere he found himself in the disastrous plight above alluded to. Into the body of his twin colleague, Mr. *x*, either the beneficent spirit above spoken of had never made its entrance, or had soon made its retreat, leaving it in the condition of a carcase, which, if not *dead in law*, was dead to the purpose of rendering, in any degree, less pernicious the condition of the law. At every step he took, our Knight found himself with this everlasting colleague at his back, exhibiting, in no other form than that of the *vis inertiæ*, except now and then a kick or two, any signs of life.

As to Mr. *x*, I borrow, on this occasion for his use, one of the names employed by mathematicians for the designation of their *unknown quantities*, not thinking it necessary to him to possess any other introduction to "*Prince* "*Posterity*" than what he has secured to himself by his own picture, as drawn by himself and published by Sir Richard, in that work of his of which mention has been already made.

As to Sir Richard—what things he did—what other things he *tried* to do, and would have done, but for the *giants* and *dragons* he had to encounter in his way—all the while with this mass of proud flesh at his back—matters of that sort belong not exactly to this place: any more than the sort of requital he met with, in another character, (see p. 117) from a pair of learned brethren, whom he found so much more perfect in the art of "dwelling together in unity," than *he* and *his*.

Of the list of his achievements and less successful endeavours, one alone belongs, by any direct title at least, to this history:—*viz.* the discovery, made by him, of the pitch of perfection, at which the *art of packing* (that master art of which the elements have been endeavoured to be delivered as above) has been carried in the application made of it to *special juries*.

Beholding in the *Court of Exchequer*, as above, the great manufactory or workshop, in which it was carried on, and seeing more to admire in the *ingenuity* displayed in it, than

in the *purposes* to which he saw it applied, he addressed a letter to the *chief conductor* of that important branch of business, noticing the state of the art, together with such observations as had been suggested by it.

At this time he was either *charitable* enough to *suppose*—or, (what seems the more probable interpretation of the two) *decorous* enough to *seem to suppose*, that the mode in which the business was conducted was a secret to the pre-eminently learned as well as skilful person, under whose auspices and authority, he found it going on. But, if such was ever *really* his belief, it was not long before he found himself obliged to take his leave of it.



CHAP. II. THE SHERIFF TO THE LORD CHIEF BARON—NOTICES.

§ 1. *Substance of the Letter.*

FEW, simple, and important, will be seen to be the statements made by this sheriff to the Lord Chief Baron.—After the substance of each statement, follows an intimation of the sort of answer given to it.

1. That in the judicatory, over which the Lord Chief Baron presides, juries are become virtually permanent: and that the Lord Chief Baron knows they are. Of this state of things the Lord Chief Baron *admits* the existence; and moreover, as will be seen, *justifies* it.—Say, *admitted and justified.*

2. That this permanence is contrary to an acknowledged principle of the Constitution, and considered by the public as such.—*Not denied.*

3. That it is contrary to the express provision of an Act of Parliament [4 Geo. 2. c. 7. § 2.]—*Not denied.*

4. That the permanence has *packing* for its cause.

N. B. The word *packing* not employed: but the modes of operation indicated, and certain official persons indicated as operators.—*Not denied.*

5. That of the interference of the Solicitor *on one side*, *viz.* the Solicitor for the Crown, a selection, chargeable with *partiality*, is the *habitual* result. —*Not denied.*

Partly by a regard to decorum, partly by the want of that

experience which was yet to come, the sheriff was betrayed into two other assertions which proved erroneous.

6. One was—that this permanence had not among the number of its *causes*, on the part of the learned Judge whom he was addressing, either *direction* or *connivance*. This was in April 1808. But in September following we shall see him relating facts, by which, on the part of the Judge, *connivance* was rendered *certain*, and *direction* (the system of *permanence* being in the Judge's answer openly defended) *little short of it*.

7. The other was—that among the causes was either *negligence* or *indifference*, on the part of the official persons, by whom the jurors are fixed upon:—which persons, as the Lord Chief Baron could not but know, though the sheriff does not state who they were, were officers acting under the authority of the learned Judge.—But of this breach not only of *constitutional principle*, but, as virtually admitted, of *positive law*, neither *negligence* nor *indifference* had been the cause. And the proof of its not having had either for its cause is given by the sheriff himself a little further on. For, on receipt of a *remonstrance* made by him, we shall see the Master Packer giving up for the moment the supposed illegal practice, but afterwards resuming it.

§ 2. *The Letter in its own words—with Observations.*

Here follows the letter in its own words. *Phillips*, p. 166.

"To the Lord Chief Baron.

"My Lord,

"In obtruding upon your Lordship, on a question which "has arisen in the exercise of the high office which I have "the honour to fill, and which appertains, in an important "degree, to the practice of the Court over which your "Lordship so honourably presides, I am emboldened by "that urbanity and liberality, which I have discovered to be "the leading and actuating traits of your personal character.

"*Your Lordship is* doubtless *aware*, that *the public have* "*viewed with peculiar interest, for many years past*, the man- "ner in which *Special Juries* are brought together, and par- "ticularly the circumstance that *they* have consisted, with

" little variation, of *nearly the same individuals in every* " *cause, for terms and years together.**

" In causes between individuals, this is a matter of minor " consequence, but *in causes between the Crown and the Sub-*

* *For terms and years together.* Here we see the *notice* given of the *permanence.*

The fact *stated* by the *Sheriff*, and *admitted* and *justified*, (as we shall see) by the *Lord Chief Baron* is—not merely that in the special juries serving in his Lordship's Court, there have been, out of the twelve, an *individual* or a few individuals, in whose instance this permanence has had place:—but that it is the *whole body* of special jurymen that, for the indefinitely long number of years in question, has been in this state of permanence.

In the composition, given in each instance, to the jury taken from this permanent body of jurors, *some* variation, though that but a " *little variation*," is *admitted* by the *sheriff*: but, subject to this limitation, the non-variation is *admitted* by the *Lord Chief Baron.*

Of the difference between the several distinguishable lists, *seven* or thereabouts in number, that have place in the case of special jurors, an *explanation* has been given above. [Part I. Ch. 4. § 4.] Of the " little" *variation* in question, what, in the language of *that explanation*, is the result? Only that, to make allowance for casual non-attendance, and at the same time provide for general convenience (the convenience to wit of all persons who belong to any of those classes whose convenience is considered as entitled to regard)—(*i. e.* all persons concerned but the suitors) the *select and secret qualified list* is constantly larger than any actually *serving list*: in a word, that it contains some number above *twelve*: or, lest the arrangement should ever find itself disturbed by the intervention of casual interlopers, if put upon the *reduced* list, say four-and-twenty.

This *select and secret qualified list* is to such actually *serving list* what, in the East-India Direction the list composed of the Directors actually in the Direction at any given point of time, with the addition of all who ever have been in the Direction, is to the list composed of the actual Directors alone: with only this difference, *viz.* that the exclusion of supernumeraries, which, in the case of the *East-India Direction*, is determined by *rotation*, (subject to a prolongation of the exclusion in the instance of this or that individual, in so rare an event as a determination taken to that effect by a majority of Proprietors) is, in the case of the *Guinea Board*, determined partly perhaps by seniority upon the list, but partly at any rate, by chance, as well as partly by choice.

Rendering the *select and secret list* no larger than the serving list, is an arrangement that stood prohibited by divers considerations.

1. It would have rendered the *duty too severe!* it would have converted the *bonus* into a *burthen*—in the instance of every such member of the *corps*, with whose business or amusements such regular and unremitted attendance would not have suited: and it would thereby have excluded this or that useful member in whose instance the requisite obsequiousness, so often as it suited him to attend, might be depended upon.

2. The *imposition* would, in this form, have been *too barefaced*:—twelve persons, under the name of *jurymen*, sitting at all times without any variation, and thus forming a Board no less *manifestly* permanent and unchanging than that of the *twelve Judges*, could never have passed thus long under the name of a *Jury*: no not even under the habitual blindness, almost universally manifested, to every the most flagrant abuse, which, having *Judges* for its authors, is screened from scrutiny by the name of *law.*

"*ject*, your Lordship will readily conceive that *it is a prac-*
"*tice viewed with jealousy*, and *does not accord with* those
"*other features of our jurisprudence* which are so much ad-
"mired at home and abroad.

"The evil is *not* attributable to the *connivance* or *direction*
"of *the Judges*,* nor to any defect in the law, *but it arises*
"solely, as I am told, *from the negligence* or *indifference*† with
"which the juries are struck *by the proper officers*, and from
"the *interference*, in certain cases, *of the solicitors for the*
"*Crown*.‡ The freeholders' list is full and tolerably perfect,

* *Connivance or direction of the Judges.*] This, as already intimated, turns out to be a complete mis-statement: though, as already intimated, a very pardonable one. Attributable—not to the "*direction*" of the Judges?—just possible:—not to their "*connivance?*"—*not* possible.

The state of things here in question is that very state of things the existence of which (it has so often been observed) is not only *admitted* but *justified* by the Chief Judge to whom that letter is addressed. That it had his ingenuity and industry for its efficient cause is *not* certain: but that its existence was known to him *is* certain: since in declaring his approbation of it, he grounds that approbation on an experience of as long a standing as his own existence in the character of a public functionary.

Of such *connivance* does the existence require confirmation? *require*, surely not: but confirmation, if a fact so firmly established can be rendered firmer, we shall find it receiving further on: *viz.* where the permanent system having, at the instance of this *sheriff*, been for the moment *broken in upon*, by the most fully employed of the Lord Chief Baron's two *Master Packers*, was *restored* as soon as the *sheriff's* back was turned.

† *Negligence or indifference in the proper officers.*] Another mis-statement; but alike pardonable. By the Chief Judge, to whose authority the Master Packer is subject, the system having been, according to the Judge's own declaration, contemplated by him during a term of 24 years, and at the end of that term openly defended, whether, on the part of this subordinate, the acting up to this system could have been the result of "*negligence*," or altogether matter of "*indif-*"*ference*," might be left to any one to pronounce. But, whatsoever might at the time of this letter, *viz.* 4th April 1808, have been the state of the official mind in question, that it was not long before a state altogether *opposite* to that of *indifference* had place, is demonstrated by the fact just spoken of, *viz.* the restoration of this state of things, so shortly after the day when, at the instance of the author of this letter, it had been suspended.

‡ *The Solicitor* (of the Crown) *is permitted to interpose.*] In relation to the incident here spoken of, I suspect some want of clearness, if not of correctness, in the information, on which this part of the statement, thus made by the sheriff, was grounded.

1. Not only in *this*, but in all the other *packing offices*, (according to the practice, as stated in all the books *(a)*, the Solicitor, as well on *this* side as on the

---

(a) 1. For the King's Bench, Civil Office, see *Tidd* and *Crompton* by *Sellon*.
2. For the King's Bench, Crown Office, see *Hands*.
3. For the Common Pleas, Master Packers the two Prothonotaries.

" but in calling over the names, the *Solicitor* is permitted to
" interpose, and *to say who will and will not attend*, so that

other, has, to *one* purpose, a *right*—an acknowledged *right*—to *interpose: viz.* to the purpose of striking out his *twelve*, out of the 48 members of the *Gross occasional list*, regularly nominated by the Master Packer.

2. This interposition of his—this interposition, considered by the sheriff, and by him denounced to the Lord Chief Baron, as a cause of *partiality* in the selection, at what *stage* of the process is it considered as taking place? At the time regularly appointed for mutual defalcation, if by the exclusion of *twelve* out of the *forty-eight*, any apprehension, entertained by this Solicitor of a deficiency in the article of *obsequiousness*, would be satisfied, in such case all conversation, whether to the effect here spoken of, or to any other, is needless or superfluous.

3. That, the whole of this *Gross list* being at the nomination of the Master Packer, any real danger of non-obsequiousness towards the Crown side should *exist*, except in the extraordinary case of corruption successfully applied by the *individual*, the *defendant*, has been over and over again shewn to be a state of things altogether improbable: that in that state of things any such danger should be so much as *apprehended*, seems not very probable. To what *end* then any such *indirect* and *mendacious* interference?

At what point of *time*? Antecedently to the declaration and production made of the *Gross occasional list*—made, in form and ceremony, by the Master Packer (or his clerk) at the very time when, by the defalcation of 24, *viz.* 12 on each side, the number on that Gross occasional list has just been brought down to the 24 on the *Reduced* list? or not till *after* that time?

1. If antecedently, it would suppose, between the Master Packer, and the Solicitor of the Crown (the Solicitor of the Customs, for example, or the Solicitor of the Excise) a perfect and collusive understanding: yet, at the same time, on the part of the Solicitor, a fraudulent sort of language, such as would by that collusion have been rendered unnecessary. And moreover, this conversation being carried on secretly and collusively, between these *two*, at a *private* meeting, the Solicitor on the other side *not* being present, how should it *transpire*? and not once only by accident, but, as here represented, *habitually* transpire?

2. The *time* at which insinuations of the sort in question have been made, suppose it now to have been the very time of the *regular* and tripartite meeting, between the two opposite Solicitors and the Master Packer, at his office. On *this* occasion, if from such insinuations any advantage could possibly be gained to the Crown side, the case must be that, after the selection constantly made of the 48 by the Master Packer—all 48 being persons who cannot but have been put in for the purpose of affording and having an *actually serving* list, composed of persons who " *with little variation*" are in constant exercise—and therefore selected for the very purpose of producing that result, which, by the admission made by the Chief Baron, is proved to be actually and constantly produced—

4. For the Exchequer, Plea Office, Master Packer, the Clerk of the Pleas, see Edmunds.

5. For the Exchequer, Remembrancer's Office, Master Packer, the Deputy Remembrancer, there is no book of practice as yet extant: but that in the respect in question, the practice of this office agrees with that of the four other offices, may be well inferred by analogy, and is in substance affirmed, as will presently appear by the learned gentleman who dates from Lincoln's Inn.

"instead of the names being *indifferently taken and dictated*

the case, I say, must be, that after a selection thus made, the faculty of striking out twelve names—twelve names out of a list *so* formed—has frequently by the Crown Solicitor been regarded as not yet sufficient for his purpose . and on this supposition, and this supposition alone, it is that, in addition to the 12 *duly* put aside by him in the exercise of his right, some number of *others* have required to be *unduly* put aside, by means of the *fraudulent* insinuations here above supposed and mentioned.

This being the object, how then, at the time now in question, *viz.* that of the regular meeting, is it to be accomplished? Probability seems to be already out of the question: as to possibility there seems to be but one mode so much as *possible*, and that is *this*. The list of 48 being produced by the Master Packer to the two Solicitors, the Crown Solicitor takes it up and says—*This man* (speaking of A,) *will not attend, should his name remain upon the reduced and summoned list? putting him on this gross list is therefore of no use: out with him then; and, to make up the* 48, *let us have somebody else:*—This, speaking of A: and so on in regard to B, C, D, &c.,whatever may be the number of those whom, on this supposition, it appears to him advisable to endeavour in this way to get rid of.

But while, by means of this insidious *language*, this fraudulent *practice* is carrying on—the *defendant's* solicitor—what is *he* about all this while? *If this man, as you think, will not attend, then strike him out: or if you insist that the whole number to which your power of striking out extends shall remain to you undiminished, let* me *strike him out.*—Such would naturally—and, morally speaking, necessarily—be the language of the defendant's solicitor, unless *he* too were in the league against his client's interests and rights.

It is (I say) *before* the commencement of the operation of mutual erasure that, at that tripartite meeting, any such conversation, if at all, must have been held:—for, *after* that operation, the 48 being, by the striking out of 12 on each side, reduced to the 24, with what colour of reason or honesty could the crown solicitor require—and on no other pretence than that of expected non-attendance—require, that A, and B, and so on, should be struck out of this *reduced* list?

Why then did you leave his name in? exclaims immediately the defendant's solicitor: *and to what purpose strike it out now?*—Suppose his name left in; and therefore suppose him *not to attend:—where is the inconvenience?—there remain still* 23 *others: and, if there were a hundred,* 12 *of them are as many as can serve. But if* this *man be* NOW STRUCK OUT, ANOTHER *man must* NOW *be* PUT IN: *and, if another be* NOW *put in,* I *must have the option of striking him out, just as I should have had, had his name stood among the original* 48.

On this supposition then, a *serving list* of 12, "*composed with little variation* "*of the same persons,*" must have been the result of a gross list of 48, such as, though constantly formed by the Master Packer, to whom every one of their characters and habits of acting is by long experience so perfectly known, is notwithstanding so oddly constituted, that by striking out of the number any twelve that he pleases, the crown solicitor cannot yet, without increasing the discarded number by insidious practices, get such a jury as will be fit for his purpose. But instead of a constant good understanding between these two servants of the crown this would suppose a constant conflict:---on the part of the Master Packer, disposition to thwart, on every occasion, the purposes of the crown solicitor; which object, after all, notwithstanding the existence of a power adequate to

" *by the officer of the court,** *and the attendance of those persons*
" being *compelled* by the exaction of severe penalties, the
" juries are chiefly composed of those who, it is loosely

the effect, *viz.* the power of choosing the whole 48, is according to all the evidence in the case, never compassed on any occasion.

Supposing therefore (which I see no reason for not doing) supposing such conversations to have *really* passed as the information given to the sheriff states to have passed, I cannot but conclude them to have been perfectly *innocent:* and that for this simple reason, that no point could be expected to be gained by them, were they otherwise.

To what circumstance then attribute the mention thus made of them by the sheriff in this letter of his to the Lord Chief Baron?---evidently enough to this, *viz.* that the conception he had been led to form of the mischief fell thus far short of its real magnitude: the *packing,* which by the information he had received had been presented in the character of an *irregular,* and thence easily corrigible *abuse,* was, in truth, the result of *regular* and inveterate, and thence, unless by extraordinary measures, not corrigible, *practice.*

But under charges such as these, the curious circumstance is the silence of the Judge. *A judicial officer under your dependence is habitually in league* (says the sheriff) *with the solicitor on one side; and, being so in league with him, leagued with him in a* CONSPIRACY *against justice, permits him to set aside jurors, till he has got a jury to his mind.—Well* (says the Judge) *says* (I mean by his *silence*) —Well says the Judge, and if he does, what do *I* care? nor yet merely by his silence: for with all this before him, we shall see him pronouncing it in express terms, and without exception or distinction, to be " *well:*" departure from it, *better than well;* meaning the opposite to *well.* Accordingly, in the course of the letter which we shall come to presently, we shall find his Lordship speaking of certain results, which, being by his Lordship regarded as beneficial, reconcile him most perfectly to the means, whatsoever they may be, by which they are effected: yes, whatsoever they may be; and although this collusion, partiality, and conspiracy against justice, had thus been alledged to be of the number.

All this while the statement was, to his Lordship's knowledge, in many points, incorrect. Why then bestow upon it this virtual admission?—Because the *real* state of the practice was so much worse than the state thus ascribed to it. The *assumed root* ascribed to the corruption was nothing worse than casual *irregularity:* nor could the cause so assigned have been adequate to the production of the effect:—whereas the *true root* was, and is to be, found in *regular* and *established* practice: and that practice so ordered as to render the corruption *sure:* the nomination completely as well as constantly and avowedly made by an officer in the dependence of the Judge. Observing the hound to be upon a wrong scent, the fox sat quiet while the enemy pursued his course.

* *Indifferently taken, and dictated by the officer of the court.*] Consistently with the result, known to be produced—that result, to wit, the production of which is, as above, admitted, and defended by the Chief Judge, *viz.* the " *little* " *variation,*" and in effect the *not much less than identity* of the *actually serving* list, and thence the *perfect identity* of the *select and secret* list, the correct application of any such term as *indifference* does not, in *any* sense, appear practicable. Let it even be supposed that no crown solicitor ever takes any part in the business, other than what the solicitor on the other side takes, here is still a *package* as completely effected by the Master Packer *alone,* as it could be by a legion of crown solicitors:—the jury—that body, the only supposed use of

" stated, will attend; and these are frequently *the same per-* " *sons, jury after jury*, and *term after term*.

" Your Lordship will perceive, from the enclosed *letter** " of Mr. * * *, that the sheriffs have had some difficulty in " their minds on the subject of *summoning* persons thus re- " turned; considering as they do, that the clause of the 4th " Geo. 2. applies equally to *special* and common *juries*. " Yet as the correction of the evil is their object as public " officers, rather than any contention with the officer of the " court, I have felt it more respectful at once frankly to " submit the whole matter to your Lordship, in the hope " that it may tend to place every thing on its proper footing " in the pleasantest manner.

" I beg at the same time to have it distinctly understood " by your Lordship, that in making this statement, and in " writing the observations contained in this note, I have had " no design to implicate the conduct of any individual; " and that in stating the general facts, my only object has " been to justify the application which I have in this man- " ner felt it my duty to make.

" I entreat of your Lordship to believe me,
" With every sentiment of respect,
" Yours, &c. &c. &c.

Bridge-street, April 4, 1808. " R. PHILLIPS.

CHAP. III. LORD CHIEF BARON TO SHERIFF SIR RICHARD PHILLIPS—AVOWRIES AND DEFENCES.

§ 1. *Substance of the Letter.*

FOUR days after the sheriff's letter, *viz.* on the 9th of April 1808, comes, from the Lord Chief Baron to the sheriff, an answer, of the general complexion of which an

which is to serve as a check upon the Judge, named on every occasion by the dependent of the Judge.

* *The enclosed letter.*] *viz.* the letter of the learned gentleman who dates from the Temple: whose "*observations*"—being, as we shall see, and without exception, pronounced by the Lord Chief Baron to be "*perfectly just*"—are, by that confirmation, adopted, and rendered part and parcel of *his Lordship's* observations.

intimation has been given, as above.—I. Admitted and justified, the *permanence.* II. Not denied.—1. that it is *unconstitutional:* 2. that it is contrary to Act of Parliament: 3. that the mode, in which it is effected, is by officers in his Lordship's dependance, in collusion with the Solicitor on one side.

None of all these phænomena coming, in his Lordship's conception, under the notion of "*inconvenience,*" he declares—and on the authority of his own "*long*" experience—that not "*the least inconvenience*" has, from the practice in question, ever "*arisen during all that time.*"

On the other hand, to the restoring special juries to that state of independence in which they are, by the constitution, intended, and, in fact, supposed to be, he opposes two decided objections. These may be comprized under the following heads:—

1. *Encrease of vexation—viz.* eventual vexation to persons liable to be called upon to serve in the capacity of special jurors: vexation, a mischief the avoidance of which constitutes, it must be confessed, one of the *collateral ends of justice.*

2. Danger to justice—*viz.* to the *main* and *direct ends of justice*—by the prejudice that may result to one side of the cause or the other as it may happen:—to wit by a partial loss of a species of "*instruction,*" which, in the class of causes in question, he represents the jurors to stand in need of, to make them to do justice.

Theoretical classifications, such as the above, are looked down upon of course with sublime disdain by the almighty creators and arbiters of *practice.* But being my duty, it is my endeavour to place his Lordship's arguments in what appears to me the clearest as well as strongest light of which they are susceptible.

Of these supposed *inconveniences,* such is the force with which the consideration operates on his mind, that he concludes with using his influence with the sheriff to engage him to leave things as they are.

Whether, even supposing the inconveniences in question to exist—and *that* in the utmost degree of force in which they are capable of existing—whether, even on that supposition, they would *in law* constitute any sufficient *warrant,* or so much as an *apology,* for the mal-practices, the existence of which is admitted, is a point on which not much seems to require to be said.

But the very existence of the inconveniences in point of

fact, seems to call for an enquiry, which will be the business of another chapter.

§ 2. *The Letter in its own words.*

" To Sir Richard Phillips.

" *Old-Bailey, April 9th,* 1808.

" Sir,

" Permit me to thank you for the very flattering manner " in which you were pleased to make the communication I " received, with respect to the summoning of special juries. " *Mr. ———'s observations were perfectly just*;* I cannot

* *Mr. ———'s observations were perfectly just.*] These observations are those of the learned gentleman who dates from the *Temple*, as above: which observations have for their basis the opinion that the clause in question—*viz.* the clause having for its object the securing a constant change of jurymen—or, at any rate, the preventing the too frequent " *returning to serve*" the same juryman—" applies (to use his own words) to *special* as well as to *common* jurymen." Such is the opinion, with which the Lord Chief Baron declares his concurrence.

Here then is an Act of Parliament, which, in the opinion of the learned Judge himself, was meant to prevent a man from serving in Middlesex, as a special juryman, so often as *twice* in the compass of *three* terms; and this practice it is, that, understanding it to be prohibited by Act of Parliament, the learned Judge, having all along persevered in the countenancing of it, labours, as we shall see, in this letter, to preserve.

And now comes upon the carpet a circumstance of so whimsical a complexion, that the reader had need of some time to put his mind in order for the reception of it.—Such is the fallibility of human learning, that notwithstanding the learned Templar's " *observations*," and the " perfect *justness*" of them, yet so it has happened that in the pains we shall see him take to run counter to the intentions of an Act of Parliament, the learned Judge was disappointed: the case being, that after all, on the part of the penner of that Act, there was not, in truth, any such intention as that it *should* be construed to extend to *special* juries. This will be shewn presently. But as to the contempt meant by the learned Judge to be put upon the authority of Parliament, that being an act of *his own*, and not at all affected by the intention of any *other* person or persons, such as the framers of that or any other act, we can do no otherwise than take *his* word for it.

In regard to *falsehood*, a known distinction among moralists, is that between a *logical* falsehood, and an *ethical* one. Your *logical* falsehood is—where, for example, you speak of a thing which is *not* true as if it *were true*, whether you *think* it true or not: your *ethical* falsehood is—where you speak of a thing as *true*, *believing* it not to be *true*, whether it be really true or not.

The distinction, thus suggested, in the first instance, by the particular sort of obligation which regards truth, will be found applicable, with equal propriety, to an obligation of any other nature, together with the *contraventions* that correspond to it: and, in the present instance, it may on this or that occasion be

" but observe, however, that he uses the expression, ' if

of use to us, to save us from the imputation of incorrectness and injustice, should it happen to us, in speaking of any of the laws in question, to speak of them—not only as *contemned*, but as *contravened*.

In regard to the *packing* system, what will be clear enough to any person who will take the trouble of looking into the two acts in question, with this view, (3 *Geo.* 2. c. 25: 4 *Geo.* 2. c 7.) is—that the foundation of it having, not only at the time of passing the first of these two acts, but a considerable time before been laid—laid and established by the practice and rules of court, which in each court gave the nomination of special jurors to the *Master* the dependent of the Judge—the lawyer, by whom or under whose direction the several acts were penned, and who, it will appear probable, had for their principal, and perhaps for their sole, sincerely pursued object, the giving to this system an efficient degree of extent, took effectual care not to divest of that permanence, which was so essential to the expected service, the bodies which it had in view to organize.

In the character of *special Jurors* as in any other, men, (they saw well enough) could be depended upon only in proportion as they were tried. On this principle it was, that the contemplation of the *jobs* which every now and then there might be to do, produced a natural aversion to new faces. A determination was accordingly taken, that when the *permanence*, which had been denounced to parliament as the cause of the mischief, came to be prohibited, the prohibition should, if possible, be prevented from extending to *special* juries.

At the same time, as in the case of jurors in general, " *corruption*" had been the abuse, which, having called the attention of the legislature to the subject, had given a preamble to the first Act, a sentiment, compounded of shame and apprehension, prevented them from attempting to establish the exception in express words. The course they took was a more ingenious one. Exception, they inserted none;—at the same time they so managed the Act, that should the time ever come for carrying it into execution, it would, in virtue of this or that word, ingeniously slipt in for the purpose, be found, as in this very instance it *has* been found, *inapplicable* to *special* juries.

Not to overload this note, a sketch of the course they took for compassing this point is posted off to a separate chapter. *(Chap. V.)*

The odd thing is that so many learned persons—two others, besides the pre-eminently learned one—should have concurred in a mistake, thus unfavourable, in appearance at least, to the state of things he was upholding at the expence of so much pains. But, to find interpretation for all the wisdom displayed by so many learned persons, would be too much for one unlearned one. Sufficient be it for him simply to point it out as forming the matter of a problem, which must be left to take its chance for solution from some other hand.

What makes the oddity still more odd is—that of these same statutes the non-applicability to the subject of special juries (those clauses of course excepted in which special juries are expressly mentioned) had been declared more than once, after solemn argument, by the Court of *King's Bench*. Once in a comparatively recent case, that took place in Michaelmas Term, on the 25th of November 1793:—about three quarters of a year after the day, which gave the benefit of the Lord Chief Baron's wisdom to the *Exchequer Bench*. Once before that time, in a comparatively antient case, determined by Lord Chief Justice Raymond, in the case of the *King* against *Franklin*, Hilary Term, 5 Geo. 2. anno 1731; about a twelvemonth after the passing of the first and most efficient of this string of Acts:—a case the Report of which was, on the occasion, and for the purpose, of the cause last decided but here first mentioned, dug up by one of the Judges (Buller) out of the heap of dust, in which for two-and-

" you think it worth your while' to make any *reform:** this " as far as respects the Court of Exchequer, I have not " found from the *experience* of above twenty-four years, in

sixty years it had lain buried: buried as usual, lest the knowledge of it should become possible to those who were to be made to suffer for not knowing of it.

If indeed so it be, that on this occasion it had become an object with his Lordship, to shew to the people of London and Middlesex, through the medium of their sheriff, what sort of regard English Judges are in use, and upon occasion disposed, to pay to Acts of Parliament, on this hypothesis the particular turn, thus taken by his Lordship's wisdom, may be accounted for, by being brought within a general rule.

When an Act of Parliament is produced to an English Judge, and the execution of it called for at his hands, the first question with him naturally is—*whether it suits his taste:* if *yes*, he gives it his *fiat* or what he calls " *his support:*" if *no*, he deals by it as the pre-eminently learned person, here in question, dealt, and may be seen dealing by this law, the relevancy of which, if not actually believed by him, was at least feigned to be believed for the purpose of shewing his regard for it.

Thus in the instance of Lord Chief Justice *Raymond*, in the case dug up, as above, by Mr. Justice Buller—speaking of the Act, then as well as now, in question—(*viz.* 3 Geo. 2. c. 25.) " *he*" (*viz.* Lord Raymond) " said—*the act of* " *parliament was a very beneficial Act*, and ought to be supported." Note, that being in the secret, he knew that this Act, beneficial as it was, was not on any occasion on which corruption could have been checked by it, ever intended, otherwise than in show, to extend to *special* juries: and consequently, that it would not stand in the way of any of that corruption, for the purposes of which the special jury system had been instituted, and in and by this very Act, was by the *astutia* of the learned penmen spread out to an all-comprehensive extent.

He therefore who should take upon him to impute to English Judges, or to any of them, any such intention as that of overthrowing *all* acts of parliament without distinction, would utter a gross calumny: as gross a one as if he were to impute to Lord Ellenborough any such intention as that of suppressing *all* publications without distinction.—No: where, as in the instance of Lord Raymond, an act of parliament has the good fortune to be agreeable to their taste, and the parliament by which it has just been enacted is still sitting, in any such state of things, such is their condescension, they are ready to give it their " *support.*"

In regard to the question whether, as per hypothesis, in thus setting up an act of parliament his Lordship's object was to shew how easily he could put it down, some additional light may perhaps be thrown upon it, by a case which there will be occasion, a little further on, to bring to view: (*See Part IV. Chap. 2*) a case in which, if the evidence be to be believed, we shall see the Judges, all twelve of them, concurring in the declared determination to persevere in defeating the express words as well as unmisconceivable intention, of a law, made for the sole purpose of putting an end to certain oppressions and extortions, the profit of which had thus been vainly endeavoured to be snatched out of their hands.

* " *If you think it worth while*" *to make any reform.*] Of the letter thus alluded to the words are " If you should think it worth while to *rectify* the practice " which has obtained".... Here we see—alas!—a *jeofail:* a jeofail in the shape of a *misrecital:* an error large enough, had it been properly placed to have

"the character of his Majesty's law officer, or as Chief "Baron, to be *worth while*; as *I have never seen the least "inconvenience** arise from the manner of striking and sum-

given impunity to a murderer or an incendiary, and sent them out to commit fresh murders or light up fresh fires.—An error?—but to what *cause* shall it be imputed?—to *laches* in the *clerk*?—not it indeed:—to *astutia*, and welcome:—to *laches*?—presumptuous thought!—such weaknesses the law suffers not to be imputed to *such* clerks.—Some *other* cause must therefore be found for it:—but of this presently.

The light in which, the two learned lawyers—the *official* and the *professional* one—the light, with its different shades, in which the supposed contravention is considered by them, is well worth observation. the rather, as it affords a further specimen of the sort of consideration which the law of parliament is accustomed to be held in by the fraternity of lawyers. By the professional lawyer, the change proposed by the sheriff is admitted to be a "*rectification*:" a substitution of *right* to *wrong*: a substitution of obedience to an inveterate course of wilful and contemptuous disobedience. But, so rooted in the minds of the brotherhood is the habit of treating with contempt the only rule of action which is not, under the usurped name of *law*, a system of imposture, that let the *disobedience* it has been treated with be ever so flagrant and undeniable, a *doubt* is expressed, whether it be "*worth while*" to substitute to it the contrary habit of *obedience*.

So much for the learned *Counsel*:—as to the pre-eminently learned *Judge*, when *he* comes to take up the matter, thus far we see him concurring with the learned Counsel at the first glance; *viz.* that it rests with them and theirs, whether to pay any regard to an act of parliament or not: and, finding, in the doubt of the learned Counsel, a sort of *sanction*, i. e. what among lawyers passes as such, for the practice—for *that* practice, which, *without doubt* on *either* part, the legislature had, after stigmatizing it as "*corrupt*," (*see Part I. Ch. 4. § 5.*) prohibited, he lays hold of the doubt, as a sort of *authority*, entitled to have its weight, where the authority of parliament had *none*.

In the opinion thus given by the learned Counsel one little expression, however, did not altogether quadrate with the views of the learned Judge: I mean the word "*rectify*:" because, in the idea of *rectification*, a word so far from being suitable to his purpose, is necessarily included the actual existence of something *wrong*, on an occasion where the thing signified by it was to be discountenanced. His Lordship puts aside accordingly this unguarded word, which does *not* suit his purpose, and substitutes another which *does* suit his purpose. This other is the word "*reform*:" a word which to lawyers in general, in concurrence with all others, who have an interest in the maintenance of abuse in any shape, is an object of such well-known horror: having for its synonimes *theory*, *speculation*, *innovation*, *infidelity*, *jacobinism*, *confusion*, *destruction of social order*, *et cætera*, and so forth.

Judge and Barrister together, it is curious enough to observe what, in the judgment of those learned persons, *is*, as well as what is *not*, "worth while." What *is* worth while, is—violating a fundamental principle of the constitution: what is *not* worth while, is—*ceasing* to violate it. What *is* worth while is—*breaking* the law: what is *not* worth while, is—*obeying* it. What *is* worth while, is—*forming* this judicatory corps of *gentlemen pensioners*: what is *not* worth while, is—*disbanding* it.

* *Never seen the least inconvenience.*] As to the practices and results, in which

"moning special juries, during that time. *A great inconve-*
"*nience* to the special jurors must arise from summoning
"those from a *distance*.*

"The causes in the Court of Exchequer are of a nature
"quite peculiar to themselves in many respects, and the
"duration of any cause is particularly uncertain. In order
"to obtain their attendance, it has been found *expedient* to
"summon such as live *near to London*,† otherwise there
"would be *little expectation of* having *any thing like full spe-*
"*cial juries*,‡ and *almost all causes in revenue matters are*
"*tried by special juries.*

his Lordship's good fortune in not seeing "*any the least inconvenience*," is thus declared, they have already been brought to view.

* *Inconvenience....from....distance.*] On the subject of inconvenience in *this* shape, see the next chapter.

† *To obtain.... attendance.... expedient to summon such as live near to London.*] *Expedient?* Yes:—and that on two accounts. 1. Men fit for guinea-men are more plentiful *near* to London than at a *distance*: 2. For a guinea, with the chance, and that not a bad one, of earning several more guineas than one, not to speak of a good dinner, many a man would be content to come a mile or two, who would not be content to come "*fifteen*" miles;—the distance spoken of by his Lordship immediately after, as having been a subject of complaint. A mile or two a gentleman may come on foot: fifteen miles, unless it be for a wager, he will scarce ever come, otherwise than with horse or carriage.

Necessary? No: unless so it be—that, it being *found* or *deemed necessary*, or at least *agreeable* and *convenient*, to have regard to the convenience of the individual, where he has the good fortune to be an *Esquire*—it is to *that* purpose *necessary*, that none should be looked for, but those to whom the visit will have proved *convenient* and *agreeable*. In the case of the man, who is *not* in any such high degree favoured by fortune, all *such* necessity is out of the question: what necessity there *is* presses all of it upon *his* shoulders; and consists in necessity of attendance, on pain of "penal visitation"—no matter how great the distance, no matter how great the inconvenience. *(See above Part I. Chap. 4. § 5.)*

‡ *Otherwise....little expectation of....full special juries.*] To the packing system, this *fulness* on the part of special juries is rendered material and subservient, by more circumstances than one.

1. It keeps out *talesmen*, plebeian substitutes, who, being taken at random, could not in point of discipline be to be depended upon, and among whom in a cause of *real* interest, such as a *libel* cause, any one bad player might, under the system of *forced unanimity*, by possibility be sufficient to spoil the whole game.

2. The greater the number of those who attend, no one of whom ever does or ever can be made to attend, unless attendance be perfectly *convenient* and *agreeable* to him, the more *extensive*, and consequently the more valuable, this branch of patronage.

So much for *convenience*, *there* we see the convenience. But *expedience* is alledged, and whence comes this expedience? The answer is—that unless "*such*" were taken "*as live near to London*," a full attendance—"*any thing like a full* "*attendance*"—*would be little to be expected.* But why so?—The persons, on

"Within the last half year, I have had complaints in "court, by *gentlemen* summoned on the special jury, of be-"ing brought *fifteen miles from their homes*,* whereas the

whom this obligation lies, all of them in affluent circumstances, affluence in every instance the declared ground of their selection, 15 miles the longest journey which any one of them has to take—under these circumstances, out of four-and-twenty to whom on the occasion of each cause the commands of justice are signified, can twelve be too great for the number of those on whose part obedience to those commands can with probability be expected? Of such *non-expectation*, or rather such *despair*, what can be the ground? In other counties, the journey may be from twice to thrice as long---the persons to take it may be such as are not in possession of a *fifth*, a *tenth*, a *fiftieth*, a *hundredth* part the opulence: yet in that state of things what complaint is ever heard of a want of jurors?---Mark well the consistency.---men who can *best* afford it, and would be well *paid* for it, and who would not have to come so great a *distance*, cannot be expected to come, even in so much *smaller numbers*:---while men who can ill afford it, and are not paid for it, come from a greater distance, and in greater numbers.

Aye but these are but Common *Jurors:---men "who have nothing to do with the "laws" (as has been well said) "but to obey them:"---and who are accordingly kept as much as possible from knowing the laws, for fear they should obey them. But the others (you seem to forget) are* Special *Jurors:* and do you consider who *special* jurors are?---Why, Sir, they are all *gentlemen*:---gentlemen, every man of them! and when you consider this, you cannot surely be so extravagant--can you?---as to *expect*, that *they* shall be forced to attend, whether it be convenient to them or no, just as if they were so many petty farmers, petty handicrafts, or petty shopkeepers?

Here then on this occasion, as on every other occasion, we come sooner or later, to the radical and all-pervading grievance. One law for gentlemen, another for low people:---comforts and attentions heaped together on one side;---burthens and neglects on the other;---such throughout is the spirit of that spurious kind of law which has the Judges for its authors: such is the "*respect of* "*persons*," which, in the bosom of English Judges, occupies the place of justice!---And, so rooted is this partiality, that we see it thus openly avowed, just as if it were a *duty*; in which character it seems actually to have passed itself upon the religion of this our learned Judge.

Now, as to the *gentlemen* in question, to what *title* is it that they are indebted for the favour thus habitually shewn to them by this our learned Judge, the representative and mouthpiece, as on this occasion he may well be taken to be, of the learned and reverend brotherhood, of which he is so distinguished a member? Is it to any *particular* connection, in the way of interest, alliance, friendship, or acquaintance, with those learned and reverend persons, any of them, or any of their connections? this is partiality upon a small scale. Is it purely to that of their belonging to the class of *gentlemen?* this is partiality upon the largest scale.

* *Complaints.... of having been brought fifteen miles.*] Of the comparative amount of this hardship, something has been said already, (*Part I. Chap.* 4. § 5.) and something more may perhaps be to be said anon. At present, what seems to call for notice, is---the service rendered to the *packing* system by the sort of oppression thus complained of, taking into the account the complaints that were the fruit of it.

The packing system having been for years past organized, and a determination taken accordingly to maintain and defend it, whatever was capable of being made

"persons living in the immediately adjacent parts of the "county, could attend without any inconvenience. I may "add too, that some experience in serving upon Exche- "quer special juries is far from being detrimental to the "public or defendants, in as much as the *instructing jury* "*after jury*,* in the conduct of many species of manufac-

to furnish a plea in favour of it, might thus be rendered subservient to its maintenance and defence. On this or that occasion, on which the verdict was, to the powers above, a matter of indifference, this or that gentleman was summoned, of whom it was known that by his situation, geographical, domestic, or political, he was rendered unfit for service in the Guinea corps. He came accordingly, served and grumbled: and thus, out of the grumblings of this *medecin malgrè lui* of the body politic, was made an argument, for composing the establishment of *willing* ones.

Not having the honour to be in the secret, it is only from appearances that I can speak:---from appearances---and there they are.

* *Instructing Jury after Jury.... exposes both parties, &c.*] Symptoms of somnolency begin to discover themselves: and, on the part of the jurors or others, to whom the *instruction* is to be applied, if of this sort be the form in which it is to be administered, some danger there seems to be, lest the somnolency should be found contagious, and "the *points*" do as well as they can, without being "*understood*" at all.

But, this being one of the two grand arguments, of which, on the ground of reason and utility, the pillars of the packing system are composed, an attempt will be made presently to get to the bottom of it, and extract whatsoever *instruction* may be capable of being extracted from it.

Meantime may not this be among the "*points*" that might be found lying there (I mean at the bottom of the argument) or thereabouts?—*viz.* that the instruction of a Jury is work for the Judge; and, in particular, that sort of work, which sometimes calls for learned *thought*, and always occupies learned *time?*

If so, the reason, it must be confessed, is by no means a purely personal, being in no small degree a public, one. For, besides those operations of a nature purely mechanical, which, in the Equity system more especially, have been so contrived as to oppose a constant and unbending bar to the charge of *precipitation*—in regard to the work of *decision* in particular, which can never be reduced to the simplicity of pure mechanism, (*See Scotch Reform, Letter* 2. *Devices,*) in such manner as to convert into absolute superfluity every application of human reason—in regard to this *special* kind of work, some how or other so it has happened, that, in that honourable Court, the rate of progress has, for some years back, been such as to have been regarded with more complacency on the *defendant's* than on the *plaintiff's* side. Speak of the *Exchequer*, aye but look to the *Chancery:* speak of the *Chancery*, aye but look to the *Exchequer:* speak of *English Equity*, aye but look to *Ireland*---such is the sort of comfort which plaintiffs have been in use to administer to one another: yea, and continue to administer to one another to this day, unless in *Ireland* any thing has happened within this year or two, to break in upon the regularity of the consolatory circle.

Enter the *House of Lords*, regularly with the seals and mace, the motto *festina lentè*, you will find, has travelled up to the House of Lords. till, what with mechanical, what with ratiocinatory, or at least disceptatorial cunctation, the pace

" tures, and the laws on the subject, exposes both parties to
" the hazard of the *points* being ill understood, and hastily
" determined by them.

" During the long time that I have been employed in the
" Court of Exchequer, I have known *few verdicts from*
" *which I should have dissented* * had I been one of their in-
" estimable body, and they have been cases wherein the de-
" termination has been favourable to the defendants.†

of justice is, in that her highest temple, adapted---if not to the simplicity and felicity of the golden age, at any rate to the longevity of antediluvian times.

He that has to speak of these things, let him look well to his words: let him speak in parables, borrowing a ray of obscurity from the speeches which are his theme. It is at this price only that he can hope to foil the official *Oedipus*, the subpœna'd interpreter of informational *innuendoes*. But let not men complain: for it is for the use of such *Fabius's* in the character of *fee-eaters* (called by the Greeks δωροφάγοι) that in the character of *plaintiffs* and *defendants* men were made.

* *Few verdicts from which I should have dissented, had I been one, &c.*] *Verdict* and *dissent? dissent*, and, on the part of a supposed juryman from a *verdict?* Strange and never before associated ideas! Alas! were these waking or sleeping thoughts? In what region of romance were the thoughts of his Lordship wandering, when in idea he heard a *verdict* pronounced by a jury, and himself a *dissenting* member of it? By what process were two phænomena which in real life are so incompatible, brought together by his learned fancy? Speaking with respect---but, forasmuch as all this is but supposition, speaking *out*---was it that his Lordship was pleased to *perjure himself?* joining in one of those "perjuries" which Judge Blackstone has found so well associated with "piety," and which the humanity of so many of his reverend brethren have so frequently, so frankly, and so successfully manifested? was it then that thus in vision he was pleased to perjure himself, declaring *assent* by his lips, while *dissent* was in his breast? or was it that, at the end of a certain number of days and nights of inanition, having fainted under the torture, he had thus by silence given *opportunity* to that verdict, to which his *assent*, expressed either by words or action, could not by any agonies have been extorted?

Or was it, that instead of fancying himself in the jury-box, he was for the moment nodding, as if with his old friend "good Homer," and occupying--- not as now upon the woolsack, but on some other seat, more elevated, and not far distant, a place in the *House of Lords?*---forasmuch as in that august assembly, *dissents*, however rare, are neither unexampled, nor (since *there* happily they may be avowed *without* perjury) unavowed.

On the principle of the apology, made by a *Dr. O'Meara* of the day, for pronouncing before a polite congregation, so unpolite a word as *hell*, may not an apology here be due, for a word so near of kin to it as *perjury?*-- an apology?--- yes, by all means:---considering that in so many a reverend company, the *less* odious the *thing*, the *more* odious the *name*.

† *Favourable to the defendants.*] Taking for granted, which I do sincerely and without difficulty, that the cases alluded to by his Lordship under the description of *cases in which he " should have dissented from the verdict"*—it being as above "*favourable* to the defendant"---were cases in which it was unjustly favourable, *corruption* by individuals has already been stated, in another place, (*Part I.*

" Having hitherto *seen** no reason to complain, as far as
" my experience goes, it must be left to your own discre-

Chap. 4.) as an operation in which the effect in question may, with no slight appearance of probability, have had its cause.

What?---is this then your hypothesis?---is this the persuasion you are seeking to spread---viz. that in the 84 *special jury causes tried in a year in the Court of Exchequer,* (*Phillips, p.* 159) there is not *one,* in which the verdict has not been a *corrupt* one? corrupt on one side or other---either on the plaintiff's or on the defendant's side?

My answer is---that, in truth, among a given number of verdicts, I should not expect to find *more* wrong ones in the Court of *Exchequer,* than in any other Court taken at random. I could even add reasons---were there in this place any use in it, reasons, why I should not expect to find even *so many;* I could go further *still,* and add reasons why, *in that judicatory,* I should expect to find the number of wrong verdicts, as well as the degree of aberration in cases admitting of *degree,* rather diminished by the effect of the influence exercised on the Guinea corps than encreased. But, without having any other ground than as above, what I should not be at all surprized at, is---to find that now and then the favour shewn to individuals in the character of defendants had had *corruption* in some shape or other, for its cause. At any rate, supposing corruption on this side never *yet* produced, yet if it be possible for corruption in juries to be produced, produced in any other way than by open allowance of it by law, I can think of no other by which so high a probability of corruption could be produced, as by the permanency thus secured.

As to *other* Courts, I have stated already, (*Part I. Chap.* 6.) that the Court particularly in question here—*viz.* the Court of Exchequer---is not a judicatory, in which, notwithstanding my abhorrence of this system of corruption, I should expect to find wrong verdicts the result of it: and that---except such casual partialities, to the harbouring of which all judicatories are more or less exposed---it is only in the King's Bench, and even in the King's Bench, in such cases alone as are, in some way or other, connected with what is called *politics,* and particularly in *libel law cases,* that I should expect to find wrong verdicts produced by such a cause.

As to the Court of Exchequer, in *that* judicatory, I know of no worse nor other bad effects as produced by the *packing* system, than, on the part of Judges, a confirmation of the habit of open contempt as towards the authority of the legislature, the equally open violation of an universally acknowledged principle of the constitution, and the uneasiness, and by no means groundless alarm, produced in the breasts of the people, by the apprehension of injustice, though in cases in which I myself should not *expect* to find it taking place.

Now these are, in my conception, all of them, very serious evils. Having a thousand pound justly due to me, suppose I were to give to a juryman a hundred pound, or the promise of a provision for some friend or dependent of his, to secure my thousand pound to me by a favourable verdict: and the verdict, with a thousand pound damages, is found for me in consequence. Here, by the supposition, the verdict itself is not a wrong one: but, supposing the transaction between me and the juryman to transpire, would not the evil be a very serious one? Would not the feeling of insecurity under the law be much more intense and extensive than it is even at present?

* *Having seen no reason to complain.*] For *seen,* ought we not rather to read *felt?---Felt?* no: for complaining of a system so avowedly *convenient,* and so declaredly cherished, *felt,* we may well believe, no reason ever has been, by the

"tion,* whether you will risk the making us *better than* "*well.*†

"I am, Sir, with great respect,
"Your obedient humble servant,
"A. MACDONALD."

reverend and learned Judge.' But *seen....?* no: nor perhaps *that* neither: for when a man's eyes are shut, what is there that he can see?

* *It must be left to your own discretion, whether you will risk.*] Left to the sheriff's own discretion? Yes, so it was: *viz. to risk* or *not to risk*: forasmuch as to that discretion that choice could not *but* be left. But when the discretion had been exercised, the choice made, and the risk incurred, the success of the measure risked, was it left in any such rash and irregular hands? Not it indeed: no, it found its way into *regular* and *well-practised* hands: well-practised, and *well-instructed*, (it may well be believed) in the art of weighing *practical* and *official* inconvenience against *speculative* convenience. *See Chapter* 9. *Transactions at the Remembrancer's.*

† *The making us better than well.*] We are come at length to the grand instrument of defence, by which the scheme of the assailants of the packing system was finally to be blown up, and at the same time, by delicate and well-turned ridicule, covered with contempt: the well-pointed epigram, made out of the Italian epitaph, which, if a little of the stalest, was not the less fit for the purpose.

Epitaph on a *Valetudinarian*, who quacked himself to death.

Stavo *bene*:
per star *meglio*,
sto qui.

Thus done into English by T. Sternhold and J. Hopkins.

Once I was *well*, my friends most dear:
Thought to *get* better—so got *here*.

Ah, poor Sir Richard! Little did the good Archbishop, when some seven or eight-and-forty years ago, in the royal school at Westminster, he was delivering, to the future Lord Chief Baron, the splendid and well-earned four-pence, think of the doom he was preparing for you! Ah, poor Sir Richard! Well---if slain you are, it has not been by an indelicate or ignoble hand.

Yes; if stone dead, console yourself: for you lie not in bad company, any more than without an epitaph. Yes: of full many a reformer's fame has the blood been drunk by this arrow, still thirsting after more.

But the ridicule of it? Ah! thank your stars, once more, for that on this occasion you were not the *agent* but the *patient*; for, in the opposite case, a lot somewhat worse than metaphorical death---life or death in the house of *legal reform* at *Gloucester* or that at *Dorchester*, would, if *Lord Ellenborough's* law had received its execution, been your fate. *See Part I. Chap.* 9. § 5. *p.* 102.

CHAP. IV. Observations on the Lord Chief Baron's Defences.

§ 1. *Insufficiency of the Defences in any Case.*

COME we now to the consideration of the two inconveniences, the pressure of which on his Lordship's mind became so irresistible, as to force him at once upon two measures of such extremity as the violating an acknowledged fundamental principle of the constitution, and travelling on for years in a course of persevering and opened-eyed disobedience, in the teeth of the authority of the legislature.

Not that, had the advantages professed to be expected from this transgression been ever so many times as great as even by himself they could have been supposed to be, they could ever have amounted to so much as the shadow of a defence. On every imaginable supposition, the operation thus performed by the *subordinate*, by the *judicial* authority, is indefensible. The change thus effected, would it, if proposed to parliament, have been approved and carried into effect by parliament?—attempting it by judicial authority was *needless*:—would it have been disapproved?—attempting it by judicial authority was not fitting.

Instead of that of George the Third, had the reign been such an one as that of Elizabeth, in which the intention of sparing the subject as much as possible—perhaps for ever—the trouble of paying their homage at the foot of the parliamentary throne was declared—declared, from the throne itself, and merit grounded on it—at *such* a period—such usurpation might in such supposed advantages have found an excuse. But *now*—in the 19th century—when the return of the sessions is become no less regular than that of the seasons?—is this a time when the plea of necessity can form so much as a veil—any even the slighest veil—for any such usurpation?

Yet though the work be but supererogation—and the words bestowed upon it little better than surplusage—let us take up the arguments one after another, and look a little into their texture. Let us see whether, when put together, there be in them, indication of any such mass of substantial inconvenience, as could have served for a ground,

even for so much as a constitutional and regular recourse to parliament, for the removal of it.

§ 2. *Defence* 1. *Avoidance of Vexation.*

"BROUGHT fifteen miles from their homes!" Alas, poor "gentlemen!" Brought fifteen miles, each of them for no more than a few guineas—possibly even for no more than one—to a place to which every body comes, and to which, but for the summons, and the guineas, without any guineas received, and at the expence of guineas paid, they would otherwise have come.

Oh, what a charming thing it is to be a gentleman! If, on the bed of roses you repose upon, there be but a single leaf that has a pucker in it, how tender the sympathy excited in reverend and learned breasts!

Fifteen miles from the metropolis!—and in the whole of this almost smallest and most compact of English counties, exists there really any one spot banished to so tremendous and toilsome a distance?

What if it had been in one of the large or straggling counties? In Yorkshire, in Lincolnshire, in Devonshire, in Sussex, for example?—In any of those instances, how many more miles would the maximum have swollen to? But the imagination is appalled, and shrinks from the research.

Turn now to common jurymen—for the definitive trial of causes the only sort of jurymen which till t'other day the constitution knew of. Place them in one of the large or straggling counties, and fetch them to Court, each for his *eight-pence.*

Aye, but these are *low* people—people who cannot say their catechism—their *Perceval* catechism—*(See Part I. Ch. XI.* § 2.*)*—people of no "*family*"—people, (as we shall learn from the observations of the learned Templar, whose "*observations* are so *perfectly just*")—people whose *time*, if it be not absolutely worth nothing, is at any rate, in the estimate of *Exchequer* justice—or say at once of *Westminster-hall* justice—not worthy of a thought—people who, except for the purpose of thus serving in it without recompence, are thrust forth in a lump out of the *temple of justice* into the *pit of outlawry*, lest the fund of rewards provided for learned merit should fail of being adequate to that exclusively important service.

As to the principles, the true legal principles, on which *the value of time* ought to be computed, this topic will meet us in the next chapter.

§ 3. *Defence the Second. Benefit of Instruction.*

Direction to Judges, Advocates, Politicians, and other Debaters: shewing a safe Method of defending the Wrong Side of any Question, especially where you have the Advantage of Situation on your Side.

WHERE the nature of the case is such, as to afford you, for the purpose of your argument, no fact, but what, if relevant and particular enough, would not only be false, but too plainly so not to be *seen* to be so, mount up into the region of generalities, till you come to some proposition, which, being by reason of its generality neither true nor false, is by that means saved from the inconvenience of being proved to be false. By this means, should you fail of convincing men, those excepted who find their convenience in being convinced, at any rate (what is no small point gained) you secure yourself against being confuted. And among men of modesty and diffidence, those who cannot exactly find out what your meaning is, (at any rate if your "situation" be a "high" one, and *they* scholars bred up in Blackstone's school) will, if they do not plainly see your meaning to be *false*, give you credit for its being a good and true one.

Whether a rule to this effect was ever laid down in *words*, is more than my slender stock of learning will enable me to pronounce:—that it has been *acted* upon, and *that* right frequently, may be asserted with less diffidence. *Witness ourselves at Westminster*, *et cætera*, and so forth:—at Westminster, in all our *Courts*, and moreover in both our *Houses*.

"*Experience .... far from detrimental*" .... Instruction needful to human ignorance—two lessons better than one—three better than two, where two have proved insufficient—against maxims such as these, where is the caviller so perverse as to pretend to have found any thing to object? Proof against all disproof, what, at the same time, does all this prove? Among those "*many species of manufactures*," had but a single one obtained a mention, here it is that, if in the *general* proposition, thus cut down to a *parti-*

cular one, a speck of *error* had found itself included, the finger of *detection* might have been laid upon it:—meantime, in default of stronger handles, let us look out for something that for the moment may be taken hold of, though it be but of straw or cobweb.

But before we proceed to *observe* upon it, let us, by way of necessary preliminary, begin with the endeavour to *interpret* it, or, as they say in Westminster-school, and in Westminster-hall, to *construe* it—or, in plain English, to find out *the* meaning *of* it, or, when the worst comes to the worst, *a meaning for it*.

"*Instructing jury after jury .... exposes*" (says his Lordship) "*parties to a hazard.*" .... Not that from this we ought to conclude that, taken in the abstract, *instruction* is a *bad* thing:—bad, either for those to whom it is *not*, or even to those to whom it *is*, communicated.

No, nor yet that, in taking for the subject of instruction "*many species of manufactures*," there is more of hazard than there would be in confining the instruction to *some* of them, and leaving the *rest* to go without it ... But ...

But—lest to construction, carried on upon this plan, there should peradventure be no end, let us lay aside *construction*, and take up *paraphrasis*, or, as we say in English, *paraphrase*, instead of it.

Many are the species of manufactures, in the instance of each of which, in respect of this or that part, of the whole assemblage of *instruments* and operations, which, on the occasion of a revenue cause in the Exchequer, is liable to come in question, the *demand* for instruction and explanation is so considerable, that the utmost quantity of instruction that will, generally speaking, have been afforded on the occasion, and brought within the compass, of a single cause, will not have been sufficient to *satisfy* it: so that, should the same part of the process be brought a second time under the notice and cognizance of one and the same juryman, the probability is that, with the help of the additional instruction which on this second occasion he will receive, the conception which he will have obtained of the matter at this second trial, will be more accurate and complete, than the conception he obtained at the first trial, whereby in so far as depends upon him, the chance in favour of a right verdict will receive a proportionable increase.

§ 4. *Mischievous Doctrines involved in this Defence.*

MEANTIME if this, or any thing like it, be the argument of this pre eminently learned Judge. let us observe now where it leads.—We shall find involved in it the following doctrines:—

1. That, in respect of causes of the particular description in question, jury trial, in the ordinary mode, is not a fit mode of trial: at any rate, not so fit as the new mode which he has contrived to substitute to it.

2. That, for these causes, the more proper, if not the only proper species of judicatory is that which is composed of a *Board* or *Bench* (call it which you please) of permanent Judges: for example, such as the *Board of Excise*, which already to a considerable extent has jurisdiction in these same matters: the principal difference being that in this Special Jury Board there is an over number of Judges to make a kind of *rotation*: which species of judicatory, preserving to it still the name of Judge and Jury, with the forms of jury trial, he has substituted accordingly.

3. That, the mode employed by him being such, as renders this secretly formed Board of completely dependent Judges, under the disguise of jurymen, applicable with equal facility, and in practice, as there is reason to think, (*Suprà Part I. Ch. VIII.*) actually applied, at the pleasure of the dependent servants of the crown, to crown causes in general, (capital, and next to capital, excepted) and, in particular, to crown libel law causes, the superiority of advantage, attached to this sham jury trial, as compared with the genuine mode, is such, as warrants the departure made to so great an extent from the acknowledged principles of the English constitution.

4. That this superiority is even such, as not only *would* warrant *the legislature* in making the change, but actually *has* afforded to *a Judge, viz. to himself*, a sufficient warrant for making it *of his own authority*, and *without* warrant from the legislature.

§ 5. *Acknowledged nothingness of the Advantage.*

SUCH being the price paid, at the expence of the constitution, by this our learned improver for the sort of improve-

ment introduced by him, with such advantages as may be found belonging to it, a question to which the mind of the enquirer is naturally and unavoidably turned is—what may be the amount of this advantage, according to the estimate formed of it by the learned improver himself: this being the advantage for the sake of which he has been content to give birth to all those other results, the complexion of which is, to ordinary eyes, so far from being advantageous;—and, for answer to this question what we find, certified to us by his own words, is that, in his own estimation, this advantage amounts either to nothing at all, or to something between nothing and next to nothing. It amounts not so much as to the absence—total absence—of all "*detriment*" or inconvenience: it amounts to no more than the absence of "*detriment*" in *one* particular shape; *viz.* in the shape of "*experience*," "some *experience*" (says he) in serving upon "Exchequer Special Juries is far from being *detrimental* to "the public or defendants" . . . whereupon immediately come those clouds, in which we have seen this pre-eminently learned person losing himself, when he goes on to speak of the "*hazard*" to which "*both parties*" are "*exposed*" by "*the instructing jury after jury.*"

While puzzling myself with this glimpse of an advantage, being curious to discover, if possible, what might be the amount and value of it in the eyes of the learned improver himself—and, instead of recurring at once to his own estimate, as above, having fallen unawares into the error, of endeavouring to determine it, from the price I saw he was so well content to pay for it, I had strayed insensibly into the enquiry what might be the *real* amount of it: and in this view at the cost of some days of labour I had actually pursued to no inconsiderable length the analysis of it. But upon turning once more to his own words, and finding that it was not easy for any person whatever to set this supposed advantage at any lower rate than it had been set at by the learned improver himself, I saw at length, and not altogether without regret at the thoughts of the time thus wasted, that I had been all this while combating without an antagonist.

I therefore spare the reader, for the present at least, the labour of following, or attempting to follow, me through a sort of analysis so dry and intricate as to involve, in the way of indication at least, a mass of mathematical calculation. But should it ever happen to his Lordship, or to any

avowed advocate of his Lordship, at any such *bar* as that of the *House of Lords*, or even that of the *public*, to draw into question by any arguments the propriety of this his estimate, I mean in so far as it sets down this so dear bought advantage as amounting to next to nothing, I am ready to produce this my analysis, and, upon the supposition in question to defend, against these his Lordship's *first* thoughts, any *second* thoughts, either on the part of his Lordship, or on the part of any other such less dignified defenders and gainsayers.

§ 6. *Short exposure of the supposed Advantage.*

MEANTIME, in demonstration of this nothingness, one argument (it being a short one, and not involving any inquiries of detail) shall not be consigned to oblivion with the rest.

On the part, and in the person of, and from the "*in-*"*struction*" that would be afforded by, this our pre-eminently learned Judge, a jury of the *old* school, were it permitted to "*serve*," would have the benefit, not merely of "*some experience*," but of consummate experience. Now then, after the benefit of such instruction, though received in the course of no more than one single cause, to wit the cause for the trial of which such jury had been summoned, and was sitting, what would be the utmost advantage derivable to any practical purpose, from any *other*, to wit any *antecedent*, lecture or course of instruction, that could even from the *same* pre-eminently learned lecturer, have been received?—Nothing; no, nothing at all; is the answer I return with the utmost confidence. Where "*the points*" were such, as to be either plain enough in themselves, or made so by the one only lecture which, till this our pre-eminently learned lecturer set up, was ever designed by the constitution for an English jury, his Lordship would accordingly leave the decision to the opinion of these plain men. When these same "*points*" had any such intricacy in them, as entitled these plain men to the benefit of an opinion, formed and ready made for them by this at present consummately experienced, and from the first most incontestably competent, Judge, he would not refuse it to them. This incontestably competent opinion, would it find them disposed to *ac-*

quiescence?—Acquiescence would take place accordingly: and (*in the* Blackstone's *phrase*) "*every thing would be as* "*it should be.*" Would it find them disposed to *refractoriness?* it is not by any antecedent experience that they could have been cured of so troublesome a vice.

But (says some one with the proper expressions of regret) the country (alas!) cannot always enjoy the blessing it possesses at present, in the services of this our veteran and consummately experienced Judge: that blessing withdrawn, comes some other Lord Chief Baron, who, though the adequacy of his general legal learning will be sufficiently proved by his situation, will not, with reference to causes of the class in question, be, at the commencement of his first cause, altogether so completely endowed in the article of *experience.* Here then, upon his Lordship's improved plan, comes the benefit of an *experienced*, and thence of a *permanent* jury:—while the Judge is learning to walk, the jury will be able to go alone. But, upon the *old* plan, what experience would there be?—When the blind have no leader but the blind, the consequence is such as need not be mentioned.

I answer—were the argument, which has been shewn to be worth nothing, worth ever so much, it could not to this purpose be of any use. At a much cheaper rate than the violating of a vital principle of the constitution, an adequate allotment of appropriate experience might, at all times, be seated upon the Bench. *Set a thief to catch a thief* is a coarse proverb, but, on the present occasion, not an uninstructive one. In that division of the Court of Exchequer, (not to speak of the great Law-officers, who might not always regard a Presidentship, which has so recently cried *date obolum*, worth the honour of their acceptance) there will be always some one learned gentleman at least, by whom, in the character of licenced *accessary after the fact*, or in two words *standing Counsel*, to the fraternity of smugglers, an ample stock of *experience*—appropriate experience—cannot but have been laid in.

But (replies the learned gentleman on the other side) any rule to this effect would be an infringement upon the liberty of the *prerogative:* that liberty being proportionably trenched upon by every rule, the tendency of which is to secure the appointment of fitter functionaries in preference to less fit ones. It would accordingly be injured, if, in his

choice of Judges, it were rendered more difficult to his Majesty than it has been, to provide for the accommodation of the family connections of persons in "high situations."

Prerogative (I answer) is an argument, which is (I must confess) understood never to admit of any direct contestation. But, in the Westminster-hall Benches, besides *ten* subordinate seats there are *four* chief or principal ones: and the prerogative, it is humbly submitted, would not sustain much injury, if, for the superior purpose of private accommodation, it were to apply itself to some one of the many other seats in which no such imperious demand for experience—appropriate *chemico-mechanico-commercial* experience—as that, of which by the unprecedented sagacity of the present Lord Chief Baron, the discovery has so recently been made.

§ 7. *Mischievousness of the Doctrine further developed.*

But the material thing is that, if his Lordship's sentiments have not been strangely misinterpreted by his words, it is not merely in Exchequer causes, *viz.* Exchequer revenue causes, that, in his conception of the matter, the substitution of a permanent and dependent Board, under the name of a jury, to the jury of the old school, ought to be applied; but in all causes to which that antiquated species of jury has ever been applied: in all such causes without exception, but more particularly in *libel* causes. For, such is the nature of the *reason* thus held up by him to view, that to the application of it any narrower extent cannot surely be assigned. This reason consists of the *ignorance* under which each member of a jury cannot but be supposed to labour, the first time, at least, of his serving in that character: of which ignorance, in his Lordship's view of the matter, the influence—the morbid and debilitative influence—is such, that nothing less than permanence can afford an adequate cure for it.

The "*points*" which he speaks of as being the subjects of this ignorance—of this ignorance to which there exists no remedy but in that "*experience*" which supposes permanence—the actually existing and thus defended permanence—are, not only points relating to the conduct of manufactures, "*many species of manufactures,*" but points relating

to "*the laws on that subject*," meaning on the subject of these same manufactures.

Unfortunately, in comparison of what is to be found in the *great body* of the laws, the utmost difficulty of comprehension, and consequently of demand for instruction, for *experience* in *receiving* instruction, and consequently again for permanence of situation, the utmost demand created by those particular laws, which have for their subject "*the conduct of manufactures*," is as nothing. In the instance of every part of the rule of action, which has any species of manufacture for its subject, that rule is, in the shape of *statute* law, a shape in which it is provided with a determinate set of words for the expression of it. But, in the case of the great body of the law, remaining as it does in the shape, or rather in the shapeless state, of *common, alias unwritten*, law, there exist no such determinate set of words. In all this vast extent, the *two* sources of difficulty, and with it of demand for "*experience*" and permanence—*viz. law* and *manufacture*—are combined in one. Judges, the master *manufacturers: law*, or, what to every purpose—of *suffering* at least, if not of *instruction* or *relief*,—has the *force* of law, law itself the *product* of the manufacture.

In the case of every *other* species of manufacture—of every species of *manufacture* commonly known by that *name*, the master manufacturer viewing, in every misconception that may take place, a source of loss to himself, and having to deal with simple and uncultivated minds in the character of labourers, has for *one* of his objects, and that a *constant* one, the rendering the conception, of the *operations* to be performed, and the *instruments* to be employed, in *his* manufacture, as correct and complete as possible, employs his endeavours accordingly.

In the case of the manufacturers of *Judge-made* law, interest being directly opposite, endeavours have of course been correspondently opposite, and results equally so.

Whatsoever may have been the course of *endeavour*—whether *with* or *against* the stream of *interest*—the *result* is, at any rate, equally and indisputably notorious. The demand for *instruction*, and consequently for "*experience*," and consequently for *permanence*, being then so much greater in the cases in which his Lordship was *not* led to bring it to view, than in the cases in which he *was* led to bring it to view, and has brought it to view accordingly, this demand

covering the whole field of law in general, and that of *libel law* in particular, what his Lordship's *opinions* and *wishes* are and have been—what his Lordship's *endeavours*, on all favourable occasions, may with justice be inferred and presumed to have been, and to be about to be—need not surely be particularized.

This reason of yours—viz. the demand for experience—will you abide by it or desert it?—Desert it, there is an end of the matter, and your conduct remains without excuse. If you abide by it, will you abide by it wherever it applies with equal force? If no, *there* again *you desert it:—if* yes, *you then mean to carry it upon occasion over the whole field of* special jury trial, *and, in particular, over that part which regards* libel law. *Meaning to carry it over the whole of that field of jury trial, and, in particular, over that part which regards* libel law, *in packing into a standing Board a set of dependent Commissioners, habited like jurymen, for service in your own Court, that is, for* Exchequer service, *it has then been your meaning to enlist and discipline them for* King's Bench service.

Such in conclusion are the questions and observations that might be addressed to the pre-eminently learned author of this defence, and, as it should seem, not altogether without some prospect of effect, if the forms of the constitution were any thing better than a cloak for despotism, and if *responsibility* were, *in fact*, among the attributes of an English Judge.

§ 8. *Lawful improvement—track it would have proceeded in.*

Now, suppose again for argument sake, it had pleased this pre-eminently learned Judge to "*think it worth while*" to allow, to King, Lords, and Commons, respectively, their several votes in relation to this business; more particularly to the Commons, whose attention is, or used to be, considered as, in a more particular degree, bespoken for regulations affecting the revenue.

In the House of Commons, besides the Committees of the whole House, there would probably have been appointed some select Committee for the purpose. Thus appointed, the Committee would have set itself to work, and begun with *analyzing* the general conception thus formed by the ingenuity of the learned Judge:—decomposing it, they would have resolved it into such particulars as may be found

involved in it:—particulars, the number of which is determined by that of the several "*manufactures*," the practice of which has, under favour of that permanence which forms so really useful an attribute of the judicial seats, been brought under the dominion of his Lordship's science. The analysis thus performed, they would, in the instance of each such manufacture, have proceeded to enquire into the truth and accuracy of that general conception, and into the degree of force with which, in each instance, the argument deduced from it, in defence of a select and permanent Board, in preference to a fortuitously determined and ever changing jury, may be found applicable.

Supposing that in each one, or in this or that part of the whole number of these manufactures, the quantity of instruction necessary to the giving the requisite assurance of a right verdict, had respectively appeared so great, that the quantity of time, capable of being allotted to *one* trial by jury, could not with propriety be considered as sufficient for imbibing it, then, and not till then, would it remain for the consideration of the Committee, whether, for the obtainment of whatsoever *increased* probability of correct judicature appeared capable of being obtained by the proposed substitution, it would really be worth while that an innovation applying to so important a part of the constitution should be introduced.

Supposing this question determined in the affirmative, *then* would come upon the carpet, for the consideration of the Committee, the question concerning the organization of the permanent *board* or *bench* of Judges, by which alone, in the sorts of causes in question, correct justice is, by the supposition, capable of being administered.

Satisfied, let us even suppose then, that, by a jury, justice in this behalf was incapable of being done, would any such determination be formed by them—would any such idea be so much as proposed to them, as that of giving the name of *a jury*, to a body of men in which it had been predetermined that none of the properties of a jury should be found? would they—these representatives of the people—bring themselves to attempt putting any such imposition upon their constituents? I hope, and dare believe, they would not.—Deceit like this belongs to none but a class of men trained up in the application and formation of that art and science which is from beginning to end the art and science of imposture.

Such as above, or something like it, is the course taken by King, Lords, and Commons, when to them it seems good to take upon them to make laws; to *make* laws, taking, as they must be content to do, their chance for seeing, or if it be more convenient to them, for avoiding to see, those laws over-ruled:—over-ruled indeed, but happily always by men of transcendent science, by whom, without the trouble of studying it, the business of legislation is so much better understood.

But King, Lords, and Commons, are a dull and slow-paced set: determining nothing about *facts*, till after they have been poring over, as well as prying into, facts. How much more easily are these things managed by a learned Judge! When, at any time, he "*thinks it worth while*" to make a law, it need cost him but a *word:* nor is it necessary even to that word, to contain *thought*, or any such heavy matter, at the bottom of it.

Another thing might, in this case, be affirmed with some assurance: *viz.* that, were Parliament, at this time of day, to think fit to appoint, for this (not to speak of any other) purpose, instead of a jury, a permanent Board, in that case, into the organization of any such Board, no such barbarous and flagitious feature would now be introduced, as should put it into the power of any *one* dishonest member, to over-rule, by his own single will, the opinion, and consequent will, of *eleven* honest ones.

Parliament would, in this case, do in this particular, as it did in the case of the judicatory established by the *Grenville Act:* which judicatory cannot be defensible, but upon the supposition that what, in the case of jury trial, is called *unanimity*, is indefensible.



CHAP. V. Special Jury Corruption, Devices by which it was protected.

§ 1. *Device* 1. *Leaving to Judges a covert Ground for refusing to apply the Act.*

WE come now to account for the flaw, observable, though by our *triad* of learned persons not observed, in the reform-

ing statute, (3 Geo. 2. c. 25.) I mean its inapplicability to the principal, the new-invented, and most conveniently framed seat of corruption, *viz.* the *special* sort of *jury*.

So far as concerned the trial of causes, the use and the only use of a jury was, as there has so often been occasion to observe, the operating as a check to arbitrary power in the hands of Judges. This intended and supposed check, by the invention of the sort of jury called a *special jury*, and to the extent of the application capable of being made of it, they had already, and before the passing of this act, given to themselves the faculty of converting into an *instrument:* the determination of the individuals of whom, in the instance of this novel species of jury, the tribunal should, on each occasion, be composed, being taken by them *out* of the proper hands, and virtually *into* their own, *viz.* by being vested immediately in the hands of the permanent officer, whom, on that account, there has been such frequent occasion to designate by the appellation of *Master Packer*—their own dependent and subordinate.

Abuses respecting the appointment of jurors—of jurors of all descriptions, and for all occasions—corruptions too flagrant to be any longer endured in silence—having engaged at length the attention of the legislature, the necessity of doing something had, to the conviction of the learned fraternity, become inevitable.

In this emergency, it became their manifest interest, and consequently their care, so to order matters, that whatever it should be found necessary to do, or suffer to be done, for the prevention of abuse in the appointment of juries, should be confined to common juries, and should not, either by design or through inadvertance, be extended to those juries of their own nomination—*viz.* to special juries: but that on the contrary, every pretext and every opportunity should be embraced, for giving, to the application of so convenient an instrument, every extension of which it might be found susceptible.

At the same time, this invention of their's being incontestably repugnant to the universally recognized principles of the constitution, it became a matter of prime importance, that, of whatsoever should be done for the extension or even for the preservation of it, the true nature and operation should be kept as effectually concealed and disguised as possible.

The remedy therefore, whatsoever it might be, was to be

made to possess two characters; *viz.* an *ostensible* one, and a *secret* one: in its *ostensible* character, it was to bear upon all juries without distinction: in its *secret* character it was so to be contrived, that, if at any time any untoward accident should happen to call for its being carried into execution and effect, it should, in the case of a *special* jury, be found inapplicable: which sort of jury should consequently remain the seat of corruption and abuse in every convenient shape, notwithstanding any success which, in the instance of the ordinary and vulgar sort of jury, might have attended the measures taken for the extirpation of those mischiefs.

For this purpose various devices, part old part new, were set to work. An old established one was—the rule they had long before contrived to establish—*viz.* that *the Crown* (*i. e.* as many members of government as could contrive to get their interests included under that name) was never to be considered as bound by any Act of Parliament, unless expressly mentioned in it, which of course all persons interested would, on each occasion, take care that, if possible, it should not be.

By this rule alone, a great part of the design was already accomplished to their hands: for, by this rule alone, special juries, with the benefit of an exemption from the obnoxious restrictions, which, under the proposed new law, operated as a bar to sinister choice and permanence, might have been preserved to all causes, in which, according to the established forms, *the King* was nominally a party.

But by this rule, if alone, the benefit of the exemption would not have been extended to all causes to which it should happen to have been brought under the cognizance of special juries. Under this cognizance they had already, of their own authority, besides the above-mentioned *criminal* and other sorts of causes, brought in general all those which in contradistinction to criminal are termed by them *civil* causes, comprehending together almost all sorts of causes: and to this extension they had the assurance to ask, and the good fortune to obtain, the confirmation of the legislature, in and by this very Act. (3 Geo. 2. c. 25. § 15.)

To complete the imposition, it then became necessary to employ a further contrivance, for concealing from non-learned eyes the completeness of the exemption meant to be established.

The way in which they managed it is this:—In the case of a *special jury*, the jurors, instead of being determined as

in the case of a common jury, were, as there has been such frequent occasion to observe—were, as they always had been—"*nominated*," as the word is in the books of practice, by the Officer of the Court—the *Master*. The *Master* then, for *one* at least, if not he alone, would have been *the*, or at least *a*, person, to whom, had the corrupt practice been in this case meant to be prevented, the prohibition would have been addressed.

But to apply to this branch of the corruption;—to the branch which was under their own management—any sort of remedy, was no part of their intention. Care was accordingly taken that, to the effect in question, neither to this officer, nor to any other officer, by the staying of whose hand that part of the plague which was of their own nursing would be staid or checked, should the prohibition in question, or any prohibition, be addressed.

In the case of a *common* jury, the sheriff, as above observed, was the person by whom, out of a much more numerous assemblage, supplied to him under legal rules, by other hands (in the first instance by the constable of the several townships) the choice was made. Corruption having risen to such a pitch, that the cries of the public had become troublesome, it was become necessary that the mischief should, in some quarter or other, receive a check.

Common juries were the sort of juries in whose instance, in comparison of special juries, the preservation of the faculty of corruption was, to the purposes of the Judges, and the other lawyers, of least importance: the sheriff, in whose hands the choice of jurors of this class was more immediately reposed, was an officer, on whose obsequiousness, regard being had to his impermanence, and comparative independence, they could not place any such reliance as upon that of the *Master*, their own permanent subordinate.

The *sheriff*, it was accordingly determined—the sheriff, and he alone—should be *included* in the prohibition: the *Master*, it was determined, should *not* be included in it.

Such being the determination, what was the contrivance employed for carrying it into effect?—It consisted in the employing of such words, and one word in particular, *viz.* the word *return*, as, while to an unlearned eye they would appear to bear, alike in every case, upon the officer, be he who he might, upon whom, on each occasion, the composition of the *reduced occasional list*, (*See above Chap.* 4. § 3.) and thence as far as depended upon him, that of the ac-

tually *serving list*, (*See above Chap.* 4. § 3.) depended, would be, in case of litigation, and in the mean time by learned and interested eyes, be seen to be, in respect of the technical signification attached to the word *return*, incapable of bearing, in the case of a special jury, upon any *such* person, or in effect upon any person, at all: and thus it was that, for want of a person on whom the words in question could be found to bear, the supposed remedy was, in that case, to be rendered altogether inapplicable and without effect.

Such accordingly will be found to be the virtue of that convenient and aptly chosen word—the word *return*. The sheriff was and is the person, by whom, in all cases, what is called the *return*, was and is made:—the *return*, *i. e.* the list of the persons summoned, or at least therein said by him to have been summoned, to serve on the occasion, in question, as jurors: which list was and is, in all cases, to be given in to the officer of the court.

The difference, in this respect, between the two cases, was and is—that in the case of common jurors, the persons chosen for jurors, were and are, a number of persons greater than 24 (the number contained in the case of a special jury in the *reduced occasional list*:) and so much greater than 24 as to constitute an aggregate out of which, in the case of a common jury, the *actually serving lists* for any number of causes, tried, as belonging to the county or other district in question, on the same *occasion*, (*viz.* at the same Assizes, Sittings, or Sessions) are to be taken: and these are, all of them, of the *sheriff's* own choosing, as above: in the case of *special* jurors, they are chosen by the officer of the court —the *Master*—the *Master Packer*, out of a list furnished to him by the sheriff, being the same "*Gross list*" that the sheriff himself has to choose out of: and the Master having pitched upon the 24, sends an order, called a *Writ of Distringas*, inclosing the list (called the *pannel*) to the sheriff, who has nothing to do but to summon the persons contained in that same list, and thereupon, in his answer, called his *return*, to declare and certify his having so done.

Let it not for a moment be supposed that, on this occasion, in framing for themselves this *valve of safety*, on the part of these scientific and ingenious operators, any such cause as *inadvertence* had any share. *Return*, is the word by which they found the choice designated when made by the sheriff:—*nominate*, when made by the Master, the officer of the Court. That the *sheriff* never is said to "*nominate*"

jurymen—that the *Master* never is said to "*return*" jurymen —these are matters, neither of which could, to these learned persons, or any one of them, applying their thoughts to the subject, for a special and to themselves highly important purpose, have, for a moment, been a secret. Had it made any part of their intention, that special jurymen (the rich and well-paid jurymen, to whom alone the exemption could have been of no use) should stand exempted from the over-frequent service, as well as common jurymen, (the comparatively poor and unpaid jurymen, to whom alone the exemption could be of any use) in this case, to the word designative of the act of the *sheriff*, by whom *common* jurymen are chosen, they would have added the word designative of the act of the Master, by whom *special* jurymen are chosen:—to the word "*return*" when employed for the description of the act meant, in this case, to be prohibited, they would have added the word "*strike*," or the word "*nominate*." But their design being the reverse of this, such accordingly was the language employed by them in the execution of it. To the "*return*"—the *reiterated* return—of jurors, in the case of *over-served* jurors, the prohibition they framed was accordingly confined: to the *nomination*—the *reiterated* nomination—of jurors in the same case, the prohibition was not extended.

To make it clear, upon occasion, that, in the provisions against package, permanence, and corruption, it could not have been the intention of this Act to comprehend the case of special juries, another argument was provided.

When a prohibition is addressed to a man, care is usually taken that, in some way or other, he should find a *motive* for conforming to it. The operation meant to be restricted being the act of the sheriff, and he the person to whom the prohibition is accordingly addressed, to constitute such motive, an eventual penalty, bearing upon the conduct of the sheriff, is appointed, and denounced accordingly in the Act: to the Master, of course, no such nor any other eventual penalty is denounced.

Now from this omission, if the prohibition is understood to apply to the case of a special jury, results a sort of incongruity, by which the intention of the legislature, under the guidance of these learned persons, to exempt the *Master Packer's* corps of dependent special jurors from being disbanded along with the common jury corps, is put still more effectually out of doubt. If in the prohibition, with the

annext penalty, put upon the official act, of which the service of over-served juries—*viz.* the too frequently reiterated jury-service in the instance of the same individual, would be the result—if in this prohibition special jurors are to be considered as comprized, one consequence is, that the sheriff would, in case of prosecution, have to pay the penalty for an act done in obedience to orders made by the Master, and contained in the writ, called a *distringas* issued by authority of the Court: for, as hath been seen, it is, in the case of a *special* jury, by the *Master* each time that the 24 persons to be summoned by the sheriff to serve on that jury are *nominated*, and as such included in the writ, as above, sent by him to the sheriff. Now then, to make a supposition, instead of leaving, between their times of service, the interval appointed by the *Act*, in the case of common jurymen, let the Master, in the case of two special juries who are to serve on two immediately following occasions, compose the two lists altogether of the same persons. This, if the prohibition in question is to be understood as meant to comprehend special juries, is a direct transgression against the Act.

That on this supposition, though it is by the Master (the Officer of the Court) that the offence is committed, it is not by the Master, but by another person, the Sheriff, that the penalty is to be paid. Such injustice, it would naturally be argued, cannot reasonably be supposed to have been the intention of the legislature. Therefore, concludes the argument, be the remedy what it may, it was no part of the intention of the legislature, that it should be applied to the case of *special* juries. And, the inference being, if not strong enough to impose an obligation upon an unwilling Judge, quite strong enough at the least to afford a sufficient warrant to a willing one, the eventual inapplicability of the remedy to the case in which it is most wanted may, without much violence done to probability, be concluded.

From these provisions against package and permanence, provisions which ought in reason to have applied in common to both sorts of juries, and which accordingly were *in appearance* made applicable in common to both sorts, the sort called a *special jury* was thus *in reality* exempted:—which was the thing to be done.

§ 2. *Device* 2. *Rendering it unadvisable for a Sheriff to resist the packing.*

POSSESSED with the now antiquated notions about the importance of real jury trial to liberty, a meddling sheriff (it might at that time of day have been apprehended) might at one time or other start up, who, in the case of special juries, observing juries packed, and formed into a standing corps, in opposition to what might appear to him to have been the intention of the Act, might, in relation to this most important application of it, feel disposed to use his endeavours to give effect to it.

For the repression of any such Quixotism, it was expedient that provision should be made: and provision was made accordingly.

If, in the application of the Act to special juries, he would have greater cause of fear in the event of his using his endeavours to give effect to it, than in the event of his contemning it, the conclusion was—and, it must be confessed, not an unnatural one—that no such endeavours would be used.

Contemning the Act (it was accordingly contrived)—contemning the Act in this particular, and thus leaving the system of package and permanence undisturbed—he would run no greater nor other risk, than that of having to pay a limited, and that at the utmost a minute, penalty:—a petty sum, not exceeding 5*l.* (3 *Geo.* 2. *c.* 25. § 4.) *Supporting* the Act, he would, in the instance in question (for so also it was contrived) find himself to be committing an offence—an offence called *a contempt of Court*—and thereby subjecting himself to a mass of punishment altogether unlimited, and which, taking into account costs of defence, whether unsuccessful or successful, could not but amount to many times the amount of the penalty in the other case, as above. For, if the Master, as above, puts into a list of special jurors, (a list settled by him as above) any number of *overserved** special jurors, the order, given thereupon to the sheriff, to return those along with the other special jurors, is *a writ* or *order of the Court*, disobedience to that writ or order an offence called *a contempt of Court*, and the punishment inflictable for that offence, imprisonment for a time

altogether unlimited, with or without nobody knows what beside.

At the worst, what was made clear was, that in leaving the Act, in this respect, in a state of nullity, and the system of package and permanence undisturbed, he could not have any thing to apprehend. Called to account (suppose him in any way, though by whom should he be called to account?) for having returned this or that over-served special jury-man, *The Court* (he would have to say) *sent me a list of* 24 *persons to be summoned and returned by me to serve as jurors upon this cause, and this man's name was upon the list:—how then could I have done otherwise?—Had I omitted him, the Court would have punished me as for a contempt.*—Thus much aloud. Continuing the conversation to himself, *The King in Parliament* (he would naturally say) *may, for aught I know, have forbidden me to return this man: but what I am sure of is—that my Lord Chief Justice has commanded me. Disobeying my Lord Chief Justice, the King (I am sure) would not protect me:—disobeying the King, my Lord Chief Justice (I have reason to think) will protect me. "No man can serve "two masters;" two oppositely-commanding masters: a prudent man will serve the strongest:—my Lord Chief Justice being the strongest, my obedience is for my Lord Chief Justice.*

§ 3. *Device 3. Concealing the Power of Nomination given to the Master Packer.*

ANOTHER exertion of lawyercraft may be seen in the care taken to throw a veil of concealment over the arbitrariness of the power, exercised by the Master, in the nomination of special jurors. It is by him alone (as we have seen) that the "*nomination*,"—the choice—of the 48 is made. Whatsoever appearance of judicial audience and impartiality it might, in the year 1777, and in a case of so much expectation and publicity, as *Mr. Horne Tooke's* case, *(See Part I. Ch. 8. p. 84.)* and under a Judge no less remarkable for timidity than for arbitrariness, have been deemed advisable to assume, at this time of day, such is the progress that has been made, this arbitrariness may be seen stated without disguise in the *books of practice:* books written by lawyers for the information of none but lawyers, and without any apprehension of any such jealous eye as, by accident, might be cast on the business in the House of Commons. In the Act 3 Geo. 2. c.

25. §. 15. how is the description given of this operation worded?—Answer—in such manner, as to convey the conception, that the choice was made some how or other by somebody else, and that *auspices* were all that were contributed on this occasion by this judicial personage.—"Required upon motion as aforesaid....(says the Act) to "order and appoint a jury to be struck *before* the proper "officer of each respective Court." *Before* is the word: and false as is the conception that will naturally be conveyed by it, yet so artfully is it chosen, that no charge of impropriety would be found to attach upon it. *By* this proper officer it is true are the 48 nominated in the first instance: but then the jury is not said to be *struck*, that is the determination, of the individuals that are to compose it, completed, till, out of the 48, 24 are struck off by *other* hands: *viz.* 12 by the attorney on each side.

By and not *before* (it may indeed be observed) is however the word employed in another part of this same Act. (§ 17.) But, *nemo mortalium omnibus horis sapit:* and, as every Act of Parliament is, or is liable to be a *pasticcio*, nothing is more likely than that the clause with *before* in it should have been the work of *one* hand, that with *by* in it, of *another.*

§ 4. *Learned Advice given accordingly to Sheriff Phillips.*

THUS it was, that this Act, which, at a time of ferment, and in the view of allaying the ferment, was, in shew and pretence, provided in the character of a check to corruption in the case of *jurors* in general, special as well as common, was at the same time, in the case in which the mischief of the corruption was at beyond comparison the highest pitch, (being the case wherein the interest which its pretended extirpators had in maintaining and increasing it,) was also at the same high pitch, converted, as in the case of the lately exhibited remedy against *parliamentary* corruption—converted by suitable management and with the happiest success—into a means of not only perpetuating, but aggravating the disease.

Of the state of things here depicted—of the nullity of the power of Parliament—of the real supremacy of the Judges—of this state of things, the living Oracles, to whom Sir Richard Phillips, as above, had, at different times, be-

taken himself for advice, were, both of them, as will be seen, duly sensible.

This sheriff, being one of the speculative kind of men above supposed—ignorant, as all such men are—ignorant of the real state of *existing circumstances*—had been amusing himself with the fancy that *King George* is our King: that in consequence, disobeying King George, a man would be in peril, and that to obey *him* was the way, and only way to be safe.

These learned persons knew, both of them, better things. Your *King George*, said they, (to let you into the secret) is *King Log*: jump upon him, do any thing else upon him you please.—*King Ellenborough*, *King Mansfield*, *King Macdonald*, these are your *real* " kings:"—these, should you venture to disobey but the least of them, you will find him a King *Stork*. As to your *King George* to appeal to the laws of that *nominal* King, in justification of an act of disobedience committed against the orders of any of these *real* Kings, doing so you would but make bad worse: doing so, you would but aggravate disobedience by " *contempt*:" you might as well appeal to *Bonaparte*.

Such was their advice: and very *good*, and, as the Lord Chief Baron says of it, " *perfectly just*" advice it was. The language in which they gave it was of course their own language—their own branch of the *flash* language: but the above is the honest English of it. As for the speculatist, the reformer, he found means to understand it, notwithstanding his ignorance: accordingly by these lanterns were his feet directed, as well as his paths lighted.

As to the *Lord Chief Baron*—so little in use have he and his learned colleagues been, to consider an Act of Parliament as any thing, when their practice or their pleasure has been contrary to it, to *him* it was all the same whether in the case of special jurors, the package and the permanence had or had not been prohibited by the Act: the exemption provided in that case having been a covert one, it had escaped his observation, and he determined accordingly to conduct himself as it seemed to him in disobedience to the law.

But to the sheriff, who, had he taken upon himself to give effect to what seemed to him to be the intention of the legislature, would have had to expose himself to the resentment of the Judges, it was matter of serious anxiety to endeavour to ascertain what support he might promise himself

from the letter as well as from the spirit of the law. The learned framers of this law, not having as yet attained for themselves, nor daring to promise to themselves, for their successors, any such complete and dauntless assurance, as hath now been declared by their existing successors, had made provision of their covert exemptions and loop-holes, as above: and of these loop-holes, our intended *Curtius*, the reforming sheriff, though he did not receive a perfectly complete or correct draught, received an intimation sufficiently instructive to save him from leaping, to no purpose, into the gulph into which he had been prepared to throw himself.

Thus in the way of useful instruction—instruction which, howsoever speculative, may at any time be made to lead to a practical purpose—the quantity of written matter unavoidably expended upon this contrivance in the art of packing may be turned to as extensive an account as possible. I would recommend it to your consideration, gentle reader, in the character of a sample of the mode in which, in matters of law, the public has been always served, and may always expect to be served, till by such service the destruction of society is completed, so long as according to the existing order of things, it continues in the line of legislative penmanship to be served by lawyers, meaning fee-fed lawyers: it will continue to be served as hitherto it has been served—always with the same honesty—always with the same views—always with the same effect.

§ 5. *Special Jury System—just Suspicion entertained of it.*

THAT all the artifice that could be mustered for the occasion was not more than the urgences of the case required, may be collected from the particular recital prefixed, by way of preamble, to this very clause:—a recital from which it appears, that the indiscriminate extension of the special jury system to all causes, at the pleasure of the party on either side of the cause, had not been regarded altogether without distrust and opposition. "And whereas some "doubt (says that preamble, 3 Geo. 2. c. 25. § 15.) hath "been conceived touching the power of his Majesty's "Courts of Law at Westminster, to appoint Juries to be "struck *before* the Clerk of the Crown, Master of the "Office, Prothonotaries, or other proper Officers of such

" respective Courts, for the trial of Issues depending in the
" said Courts without the consent of the prosecutor or par-
" ties concerned in the prosecution or suit there depending,
" unless such Issues are to be tried at the bar of the same
" Courts." Thus far the preamble: and then comes the enacting part still preserving the word *before*, and giving to the party on either side, the power to force upon his adversary the sort of judicatory thus corrupted.

As to " *doubt*," if we may believe what is said in the Report of a case determined in the year 1737, about seven years after the passing of this Act, there could be no *doubt* in the case: the contrary to what is here insinuated was true beyond all doubt. No more than about four years before the passing of the Act, a search had been made in this view: *in* thirty years then last past, that is from about the year 1695, to about the year 1725, no instance of the ordering a special jury without consent of parties on both sides had been found: nor is it said that any instance had been found *anterior* to that period. Notices of the existence of such a power had indeed been now and then thrown out, but which if that statement be believed (and no reason can be found why it should not) were without any foundation either in regulation or in practice: were thrown out, and not being true, in fact, it seems difficult to imagine with what view they could have been thrown out, unless it were with the view of paving the way for this statute.*

* *Wilks against Eames.* Andrews, p. 52, Mich. 11 Geo. 2. anno 1737. The Court said, " that though it was not usual, before the said Act, to grant special
" juries without consent, yet in some instances, and for special causes, it was,
" and might be done: .... And Lord Chief Justice cited the *King and Burridge, Pasch.* Geo. 10. when upon search it was found that no special jury had
" been granted for thirty years then last past without consent; and the Lord
" Chief Justice Pratt was *then* of opinion, that the Court might grant a special
" jury without consent, but the other Judges differed:" *i. e.* were of opinion that the Court could not grant a special jury without consent.

From this it seems that at both periods the Chief Justices knew what they were about, and accordingly invented pretences for thus forcing in the special jury system: but that, in *Pratt's* time at least, *viz.* anno 1725, the *Puisnes* were not in the secret: inasmuch as *they* opposed the extension thus endeavoured to be given to it.

From this it may be seen that a special jury, in the character of a subject and instrument of package (unless before this time, the Crown Lawyers assumed, and by the Judge were permitted, to exercise a right of commanding a special jury in Crown causes, as would naturally be the case) as well as a source of increased lawyer's profit, took its rise from this Act: and as well in the character of an *occasional* source of *corruption* as in that of a *constant* source of lawyer's

§ 5. *Harmony between the Astutia of 1730, and Do. of 1808.*

WE come now to an observation, which brings the consideration of the *so long ago* enacted *statute* within the li-

profit, it has already been seen how valuable an engine it has proved in the manufactory of abuse.

In the character of an instrument applicable to the purpose of *corruption*, our estimate of its value may receive some assistance from a circumstance mentioned in the same Report. In "the case of the Corporation of *Bewdley*," the trial being at *Bar*, *twenty* guineas a piece, it appeared, had been given to each juror. Nor would the enormity of the sum have transpired, but for an application made by the losing party for what is *there* called "*lowering it*," which the Court did: *viz.* to *five* guineas: *i. e.* forbore to oblige the losing party to pay any more than five guineas, not obliging him to pay the *twenty*: for, as for taking out of the pocket of each juror 15 guineas out of the 20 he had received, that was altogether out of the question:—that was what could not be done. The money was already in their respective pockets: and there was neither *statute law* nor *judicial practice* that could have furnished so much as a pretence for making them disgorge it.

In the same case, in speaking of the quantum of the extra allowance given to these well-selected assessors, an observation made by *Strange, Solicitor-General*, is—that "though the practice is to pay them more than to common jurors, this "is mere matter of *generosity*, and ought not to be reimbursed by the other (meaning the losing) party."

All depending on *generosity*, and the *Crown*, *i. e.* its servants, and they alone having it in *their* power to be *generous*, and without bounds, as well as without any expence to themselves, it may be imagined what sort of a chance *an individual* would have, under a set of jurors, all named by this *one party*, possessing, and all-along exercising, the power of either rewarding them, at the expence of others, to an *unlimited* amount, or *not* rewarding them *at all*, according as they behaved.

The Crown, had it or had it not a special jury at pleasure, and not depending on the consent of the party on the other side?

A circumstance indeed that contributes to render it probable, from the first invention of special juries, the *King*, *i. e.* the servants of the Crown, never failed to have a special jury of this sort for asking for, is---the care which, at the early period above-mentioned, *viz.* the beginning of the reign of *King William*, was taken that, the faculty of striking out the 12 out of the 48 should *not*, on the part of either party, be exercised, without its being specially *applied* for, and on application *ordered*.

And so lately as in the time of *Lord Mansfield*, it is stated as a *rule*, that when the solicitor omits to attend after notice, the Master in K. B. may strike the jury *ex parte*. *Cowp.* 412. *Rex* v. *Hart.* Hilary, 16 Geo. 3. B. R. 1776.

In such cases as were left to a common jury, that is in causes the importance of which was not sufficient to excite any interest in the bosoms of the Judges or their connections, chance was the instrument they saw directed to be employed for the reducing the number on the *Gross list* to twelve---the number adapted to the *Serving list*. Had *justice* been the object, here then was a *principle* and a *precedent* to have pursued. But in cases that were deemed worth their attention,

mits of the *present* epoch: I mean the use which, on the occasion in question, appears to have been made of it, by the *Lord Chief Baron*, with the privity of course, and consent, all along, of his learned and reverend colleagues.

The deficiency by which, in respect of the clause prohibitive of permanence, the Act *was* and *is* rendered inapplicable to the subject of *special* juries had probably been observed and *understood*, but was not thought fit to be *indicated*: it was not to be indicated—why?—lest peradventure, attracting *parliamentary* notice, it should be *supplied*.

But, to the *sheriff*, in pursuance of the *advice* that had been given him, *viz.* from the *Temple*, it *might* have hap-

these ministers of justice, knew better than to trust, in any degree, to *chance* what might be *secured* by *prudence*.

In the case in *Cowper* before *Lord Mansfield*, (a) a curious enough circumstance is the carelessness, real or simulated, of the Judge, in regard to the person by whom the *twenty-four* should be struck out, in case of a refusal on *one* side (in the case in question it was on the side of the *defendant*) to strike out the twelve—the right of striking out which, according to the practice, belonged to *each* side, and consequently to *that* side.

What the *reason* of the case plainly enough required was—that the party attending for the purpose (in the case in question, the *solicitor* of the *Crown*,) should exercise *his* right of striking out *his* twelve, and *then*, the *defendant's solicitor* making *default*, the right that belonged to *him* should, *from necessity*, be exercised by the supposed impartial officer, the *Master*.

In *this* case both on the part of the *counsel* by whom the motion is *made*, and on the part of Lord Mansfield, the Judge, by whom the prayer of the motion is *refused*, an assumption made is—that in case of such default, it belonged to the *Master*, and him *alone*, alone to strike out the whole four-and-twenty: that is twelve for the defendant who made *default*, and twelve for the *solicitor* of the *Crown*, who made *no* default.

In this case had there been any real distinction of *interest* and *feelings*, nothing could have been more palpably partial and iniquitous, than to put it into the power of *one* party, by thus wilfully making default, to deprive the *other* party of his right. Yet that apparent injustice—and this too to the prejudice of the *Crown*—was committed.—Why? because between the servants of the Crown in the *judicial* line, and the servants of the Crown in the *agency* line, the understanding was so entire, and because amongst them it was so perfectly well understood,

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(a) "*Rex.* v. *Hart, Esq. Cowp.* 412. Friday, Feb. 2, 1776.

"Mr. Davenport moved for directions to the Master to strike out 24 of the "special jury *ex parte*, in case the defendant and his agent should omit to at- "tend the Master's appointment. The motion was founded on an affidavit of "three appointments having been made, and their declining to strike out *till a* "*day should be appointed for the trial*....

"Lord Mansfield was clear the Master might do it without any direction from "the Court; and declined giving him any in particular, but had no doubt he "might do it now just as if he had proceeded last term; ...."

pened to bring the question before the *Court*, *viz.* in the mode, in and by that advice, recommended. If so, *his Lordship* and *their Lordships* were ready for him. On arguing the matter on the ground of the statute, its originally intended inefficiency as to this point would have been brought to light. Though not perhaps through *malice*, the *would-be reformer* would have been found a *trespasser:* and, in addition to *Costs*, (costs *got* by him in the *negative* sense) in addition to such his costs, accompanied with a reasonable dose of contempt in the form either of *avowed contempt* or *pity*, he would have got his *labour* for his pains.

Against the hypothesis thus advanced, this or that passage may be objected in which the *prudence* of the *serpent* does not appear quite so conspicuous as the *simplicity* of the *dove*.

But should the *fact* be even admitted, the *inference* has no need to be admitted along *with* it. In a line of action to which a man is *accustomed*, the most consummate skill is not incompatible with equally consummate awkwardness, in a line to which he is *strange*.

The line to which an English *lawyer*, and in particular an English *Judge*, is *accustomed*, is that of making the most of the abuses, of which the *common*, *alias unwritten*, law, and in particular that branch of it which regards *judicial procedure*, has been made up, *viz.* by the hands, and for the benefit of his predecessors: of making his *advantage* of them on *every* occasion, of defending them as often as it may happen to them to be *attacked:* opposing every *effectual* remedy, and, as often as remedial measures cannot be kept out altogether, infusing, into such as are forced in, as large a proportion of insufficiency and mischievousness, as it may be found possible and prudent to introduce.

The line which is altogether *strange* to him, is the line of *honest* and *beneficial* legislation: including the *abolition* of such mischievous and inefficient arrangements as may happen to have taken place already as above. Accordingly, it is not by *mere ill will*—the immediate result of adverse interest—that a true-bred English lawyer, bred in the school

that, so far as concerned the interests and wishes of the servants of the Crown of all descriptions, whether the person by whom the striking out were performed were the *Master Packer* or the *Crown Solicitor*, the *effect* would be just the same. Thus it is that to any *scrutinizing eye* the *secret*, had there been any, would have been betrayed. But there was *no* secret in the case: and, as to any *scrutinizing eye* there was none such within sight.

of *Coke* and *Blackstone*, is prevented from doing any thing *well* in the line of honest and beneficial legislation: it is moreover by genuine and unaffected *dimsightedness* and *awkwardness*.

Even though the task to be performed were of no stranger a complexion than that of making a *pair of shoes*, the most expert as well as learned and eloquent *Advocate* that ever pleaded at an English *bar*, or *Judge* that ever sat upon an English *bench*, would probably find it matter of extreme difficulty to make with his own hands any such article. But supposing the task to be the making of a *code of laws*, in such case, even though by some strange revolution or metamorphosis, he were on a sudden to become personally reconciled to it, he would find much less difficulty in the making of a pair of shoes than in the making of any such *code of laws* as should prove to be (supposing such to be the quality required to be given to it) a really useful instrument in the hand of impartial, undilatory, unvexatious, and unexpensive justice. In the making of the shoes, nothing more irksome could have happened to him, than the employing, in so relatively useless and unprofitable a work, the necessary quantity of labour and time: from the very first stitch to the very last he would not have found himself under any such unpleasant necessity, as that of violating any maxim or opinion, he had been accustomed to regard with affection and respect, or acting in opposition to the interests, opinions, or *feelings* of any of his friends. In the making of the beneficial body of the laws he would not only have to lament at every stroke of the pen, the misapplication of so much labour and time, but at every other line he would feel himself running counter to some such favourite maxim or opinion, as well as running counter to the interests, diminishing the profits, disturbing the ease, lowering the reputation, galling the pride, and, in the words of *Lord Ellenborough's libel law*, "*hurting*," "*prejudicing*," "*injuring*," and "*violating*," the "*feelings*" of the companions of his youth, and most familiar friends.

He would *find* himself, or, as now we say, *feel* himself running counter to that which, in lieu of the once universally pursued or professed to be pursued, but now antiquated and exploded *end* and *object*—*viz. the greatest happiness of the greatest number*, has now of late openly, deliberately, and in black and white, been avowed and acknowledged as and for the permanent end and object—if not of all go-

vernment, of the government of his Majesty's *most favoured set of servants*—*viz.* the preserving from "*hurt*," "*prejudice*," "*injury*," "*violation*," and every other such unpleasant accident, the feelings of "*great characters*," in "*high situations*."*

CHAP. VI. Learned Advice from the Temple.

LEARNED advice, in the shape of a Letter from the *Temple*, having, on this occasion, borne no inconsiderable part in the business, *viz.* partly as having afforded guidance

* "The Duke of Portland.... informed me.... that your Lordship thought a "change in Lord Castlereagh's situation in the government desirable,—provided "it.... could be reconciled to Lord Castlereagh's *feelings*.—The Duke of Port- "land.... told me that hopes were entertained.... of facilitating a general ar- "rangement, in which *a complete change in the war department* might be effected "consistently with Lord Castlereagh's *feelings*." See in Cobbett's Register, Dec. 2, 1809, the letter of *Mr. Ex-Secretary Canning* to *Earl Camden, Lord President of his Majesty's Council*, in which the conduct of a war on which the fate of the human species depends, is, for near six months together, *viz.* from 2d April to 20th September 1809, in the minds of the Minister who writes this letter, the Minister to whom this letter is written, and the other Ministers in general, stated and shewn to have been a secondary consideration: the *primary*, and during that whole time the *prevalent*, consideration being the *feelings* of a single individual: that individual, a Minister whose unfitness for such his employment had during all that time been recognized, *viz.* either by every one or by almost every one of his colleagues:---and such colleagues!

Now in any *such* Cabinet (not to speak of *contingent ones*) suppose a proposition brought forward for the making of any such code of laws as should be subservient to the purposes of *cognoscible, impartial, undilatory, unvexatious, unexpensive, justice.* On what circumstance would the reception given to it depend? Answer---on its being capable of being made "consistently with," or "of be- "ing reconciled to" the "feelings" of the great character whose seat is at the head of the law.---Were it to happen to the rule of action to be cognoscible, impartial, and in all its other points, in the highest degree, or in any higher degree than at present, subservient to the greatest happiness of the greatest number--- were the recourse to it rendered, in any degree, less dilatory, vexatious or expensive, than it is at present---this would, in all its points, be a result opposite to the interest of that great character in all its points—*viz. money, power, ease, reputation, vengeance*, with their *et cæteras:* also to that of the several learned, and noble and learned, and other *great characters* his colleagues, and other his friends. Such is the prospect which the *law* has of seeing itself well-*conducted.* As to the *war*, had *that* been *well-conducted*, the result, so far from being in any point *opposite*, would in every point have been, and in a high degree, subservient to the interest of the great character by whom it would have been so conducted.

to the sheriff, partly as having helped to afford legal notice to, and been honoured by the declared approbation of the Lord Chief Baron, the reader will probably expect to see it laid before him *here*, instead of his being sent in quest of it to another publication.

I proceed therefore to exhibit a copy of it, subjoining, in the form of *Notes*, a few observations of the propriety of which the reader will judge.

" To Mr. Sheriff Phillips.

" Dear Sir,

" I agree with you in thinking, that the clause referred to " in the inclosed Act of Parliament applies to *special* as well " as *common jurymen*;* *for* if it be inconvenient† for the " latter to attend oftener than the Act requires, it must be

* *Applies to special....jurymen.*] This is the clause, forbidding the summoning and returning of over-served jurymen: this the *passage*, which drew (as we have seen) from the Lord Chief Baron the avowed persuasion, that the practice he had so long been pursuing, and was then defending, was a practice meant to be prohibited, and prohibited accordingly, by parliament. But that, in this persuasion, as well the learned Judge as the learned Counsel, whose observations he found so "*perfectly just*," were perfectly mistaken, has, in the last preceding chapter, been shewn at large.

† *If inconvenient for the latter to attend.... much more to the former.*] Inconvenient to a guinea-fed juryman to attend oftener than the Act requires!— About as inconvenient as to this learned gentleman it is to have too many briefs. When the briefs crowd in too thick upon him, he returns the overplus: when the summonses crowd in too thick upon the Guineaman, he, the Guineaman, obeys such as he finds it agreeable and convenient to obey, and neglects the rest.

Note that of the 24 who, for each cause, are always summoned, it is but 12 that, in any one cause, can ever serve: therefore every other time of his being summoned, each special juror, or in other words half the number summoned, might, if the inconvenience were real, stay at home without being missed: and, to a majority composed of these gentlemen, suppose even a few yeomen jurors added, *viz.* in the character of *talesmen*, who would ever care about it?

Of the terrific *fine*, which (by the Act of which the Act in question is an amendment) is, in case of non-attendance hung over the heads of jurymen, were I to add that it does not extend to special jurymen, his reply would be of course—*oh, but this is according to the construction you put upon the Act:—mine was different.*—Be it so. But what reason could a sheriff have for supposing, that when he was sending an invitation to a gentleman, to partake of a good dinner, in good company, after sitting to act the part of a Judge, and to receive moreover a guinea at the least, and perhaps a number of them, he was putting him to "*inconvenience*?" or if, in the instance of this or that particular gentle-

" much more so to the former, on account of their *rank* and
" station in life.*

man it were an inconvenience, what is there that could prompt a sheriff to be too frequent in the reiterated production of such inconvenience?

Note that, in those days, a guinea was worth at least twice what it is worth at present.

Twenty years or thereabouts after the passing of this supposed inconvenience-producing Act, (take for the Act either the *original* Act of the 3 Geo. 2. or the *amending* Act of 4 Geo. 2.) the topic of special juries came again upon the carpet: and what was the complaint then?—that, in the character of special jurymen, gentlemen were put to inconvenience by over-attendance?—No:—that they were oppressed?—no: but that they were over-pampered·—that " great " and extravagant fees were paid to them:"—and " *frequent*" are these complaints declared to have been by the Act (24 Geo. 3. c. 18. § 2.)

* *Inconvenient.... it must be much more.... on account of rank.*] What we have just been seeing, is a specimen of the sort of regard paid by the fraternity of lawyers to the convenience of *gentlemen* jurors—the class of jurors, whose convenience *is* entitled to regard —let us now observe the sort of regard paid by the same learned fraternity to the convenience of *common* jurors—low people, whose convenience is entitled to........ to what? to *any* regard?—to this one knows not exactly what to say:—either to none at all; or, if to any, to next to none.

Instead of *convenience*, we might say *feelings*. Since the use made of it for crushing the liberty of the press, *feelings*, always the more *sentimental*, is become the more *legal* term.

To a man who, in the sale of his time, finds the sole source of his subsistence, less inconvenient to sacrifice a portion of his time for 8*d.* than to a man to whom not only subsistence but affluence is secured, and *that* without the sale of any part of his time, it is to sell, on this particular occasion, the same portion of his time, receiving for it, besides a very good dinner, at the least one guinea. This is the proposition, with the supposed truth of which the learned gentleman was not only possessed, but to such a degree captivated, that, under the guise of a *reason*, introduced in form by the word *for*, it led him astray into what we have seen to be an erroneous conception, or at any rate an erroneous declaration, of the meaning of an Act of Parliament.

Such is the proposition, which, in this its character of a *reason*, stands at the head of those " *observations*" which, in the sight of the pre-eminently learned Judge, were so " *perfectly just*:" and which, in that of another learned Barrister, who dates from *Lincoln's Inn*, will be soon seen to be so " *perfectly clear and* " *correct*."

The information thus afforded is no light matter:—inasmuch as here we see, expressed in *words*, the sort of regard, which the *convenience*, the *feelings*, the *interests*,—(any of these words may alike be employed)—the *interests* (say) of the vast majority of the people, may expect to experience at the hands of lawyers of all sorts and sizes, official as well as professional: the same sort of regard which stands expressed by *deeds*, in the sort of law, framed by these same learned hands—for the *use* shall we say—no, any thing but the *use*—of that same despised portion of the people.

In this sketch may be seen a picture—a family picture—of the fraternity of English lawyers:—a picture which cannot be charged with hostile distortion or discolourment, since it is drawn by their own hands.

From this view of it might be formed, *à priori*, a conception, of the treat-

"But with regard to the sheriff, I think there is a very
"material distinction between common and special juries.
"With respect to the former, the returning them upon the
"*venire facias* rests with the sheriff; and as he is required
"by the 5th section of the stat. 3 Geo. 2. c. 25. to enter
"or register in a book to be kept for that purpose, the names
"of such persons as shall be summoned, and serve as jurors

ment which, by sad experience, this portion of the people *feel* rather than *see* themselves to have met with at their hands: what they have met with, and for ever may justly expect to meet with, so long as, in *Blackstone's* sense and words, "*every thing is as it should be.*"

Not that they are altogether devoid of sympathy:—for no human being was ever altogether devoid of sympathy. But as is but too natural, their sympathy, such as it is, is confined to the classes with which they associate or wish to associate: and having, as we have seen, been so liberal of it to the distinguished few above---the men in high situations---they have none left for the undistinguished multitude beneath.

Hence it is that in England (nor indeed in England only) the people have come to be divided into two classes: one, of those to whom justice is to be *sold;* the other, of those to whom justice is to be *denied.*—denied, for the benefit of those who alone can come up to the price: and who by that means are authorized and required to purchase the faculty of oppressing, under the name, and with the power of justice.

This is the authoritative comment upon *Magna Charta:*—the comment, written, day after day, by the fee-fed hands of the *twelve Judges:* not forgetting the one supremely learned person, who sits at the head of the law, in this as well as so many other senses.

That a poor man can better afford to work for nothing than a rich man, (for this, though a short interpretation, is a sufficiently correct one) is a proposition of that sort, which it seems impossible for any man to repeat, who, after notice given him that it will be looked into, should bestow on it a second glance. But how impossible soever it may be for a man seriously to *think* so, nothing can be more easy to a man than to *say* so: and when such is the state of *his feelings,* that, while those of the higher classes are something to him, those of the lower classes are as nothing, it is no less natural for him to say of the working class that they can afford to be made to work for nothing, and that they don't mind being made to work for nothing, than it was to the *Cook* to say of her *eels,* that *they don't mind being skinned.* Why did not the Cook's eels mind being skinned? because they were *used to it.* Why do not the Lord Chief Baron's common jurors mind being made to work for nothing? because they are *used to it.* The Cook for her wages is used to see eels skinned without minding it: and the Lord Chief Baron, for his fees, and those of his friends, is used to see the great majority of the people outlawed and stripped to the skin, without minding it. In both cases the *construction* is ambiguous; but in both cases the *import* is clear enough.

"Perfectly just" as this mode of doing justice to rich and poor is, it seems, at present, it has not been looked upon in that light by all Judges at all times.

Wilkes against Eames. Mich. 11 Geo. 2. Anno 1737. Andrews's Rep. p. 31. "Probyn Just: said, that he knew no reason why special jurors, attending a trial in "the country, should have more allowed them than a *common* jury; the *other* be- "ing generally *more able* and better qualified to serve their country than these."

" on trials at *Nisi Prius*, with their additions and places of " abode, and also the times of their services, so I think that " if *he* were to return any persons to serve as common jury- " men oftener than he ought, *he* would be liable to the " penalties of the statute; but with respect to special juries " they are struck before the Master of the King's Bench, " and the Remembrancer in the Exchequer, under the 13th " section of the above Act of Parliament, which declares " that the jury so struck shall be the jury returned for the " trial of the issue; and accordingly their names are spe- " cially inserted in the distringas. If the sheriff, therefore, " who has nothing further to do with the striking of special " juries, than attending with the freeholders' book out of " which their names are taken, were to object to the nomi- " nation of such as had before served within the limited " time, and his objections were over-ruled, he would not, I " think, be liable to any penalty for summoning them upon " the distringas; and indeed if he were to refuse to do so, " he might incur a contempt of the *Court*, who *would not* " *suffer their process to be disputed** in the execution of it " by the sheriff. If you should think it *worth your while*,† " however, to *rectify* ‡ the practice which has obtained, of " calling so often upon special jurymen to attend at *Nisi* " *Prius*, the proper mode, I conceive, would be, when you " attend with the freeholders' book for the purpose of strik- " ing a special jury, to carry with you the book containing " the names of such persons as have already served within

* *Court.... would not suffer their process to be disputed.*] No: *that* they would not; *viz.* if by any one it happened to be found " *worth while*" to bring the matter before them:—and, at any rate, this was a very good advice.

† *Worth your while.*] This is the passage which hit so exactly the taste of the Lord Chief Baron, and which accordingly, in the character of an argument *ad hominem*, he made use of, in the representation made by his Lordship, as we have seen, to the sheriff, in hopes of engaging him to give up so romantic a scheme. Would you give execution, would you pay obedience, to an Act of Parliament?—think first whether it be worth while:—if it be not worth while, who ever (*i. e.* which *of us* ever?) thinks of paying obedience to an Act of Parliament?

‡ *To rectify the practice.*] *Rectify*---as applied to *practice*---to the practice of *Judges*---to *his own* practice---this was a word which has been seen to be—and indeed might without much expence of thought have been expected to prove--- not altogether to the learned Judge's taste: accordingly, as we have seen, and for what reason we have seen, slips in the word *reform* instead of it. For, under this name, though not so easily under the name of *rectification*, the proposed and dreaded correction might without reserve be slighted and discountenanced.

"the last two terms or vacations, and *apprize the Master or* "*Remembrancer** thereof, requiring him not to nominate "them afresh; and if he does, you might try the effect of "an application to the Court to set aside the nomination, or "have others nominated in lieu of those who had served "before, on the ground that you might otherwise by possi-"bility be subject to a penalty for summoning them. By "this means *the opinion of the Court would be obtained*,† and "they would *probably* direct their officers to *alter the prac-*"*tice*‡ in future.

"It would not, I think, be prudent for you to hazard "the incurring a contempt of the Court by not summoning "any of the jurors named in the distringas, on the ground "of their having served before within the limited time;

* *Apprize the Master or Remembrancer thereof.*] In pursuance of this advice, the sheriff did "apprize the Master or Remembrancer thereof:" and in Chapter the 9th, we shall see what he got by it. In giving to the sheriff *this* part of the advice, this learned friend of his was *quizzing* him; unless so it were that the learned gentleman, how well soever *deserving* to be, *was not* completely in the secret.

† *The opinion of the Court would be obtained.*] Yes:—and so would the *expence* of obtaining it: and moreover the disgrace and ridicule of presuming to endeavour to obtain it. To the sheriff, along with the expence, might have been obtained, perhaps, another epigram, still more pointed and *quizzatorial* than the Italian one. From any such "*urbane*," (for in the application of this attributive the sheriff cannot be accused of error) and polished bench—what would *not* indeed have been obtained is—any such attributive as that of the "*greatest fool*," or that of the "*weakest man*," that ever walked over earth without a keeper.

In the character of an Advocate, to apply such attributives belongs *perhaps* only to Sir Vickery Gibbs: in the character of a Judge, to take them up for the purpose of rendering them more bitter, under the guise of sweetening them, as Lord Ellenborough did to this same sheriff, on an occasion, on which, according to his Lordship's own declared opinion what was said by this same person, in the character of witness, could have no influence on the fate or merits of the cause, belongs surely only to Lord Ellenborough.

In the same common design different parts are acted, as nature, habit and situation serve, by different characters: and amongst them, while no pretence for any more substantial vengeance can be found, such is the retribution that ought to be expected by all such adventurous Knights, as think to remove though it be but a grain of the mountain of abuse, accumulated by the hands and for the use of *English*—add or of *Scottish* lawyers.

‡ *They would probably.... alter the practice.*] *Alter the* practice indeed!—Uncompelled by parliament, a *Court*—an English Law Court—or, uncompelled by the people, an English parliament—alter for the better its own practice! Yes: when without compulsion, the Mufti turns Christian; or the Pope, Protestant. The Court alter its own practice! If for the better be meant, when was it ever known to do so?—On the part of the learned author of this most learned advice, behold still the same pleasantry; or still the same simplicity and inscience.

"particularly as you would not, I conceive for the reasons "I have given, be liable to a penalty for summoning them; "and though the jurors who had served before might be "*excused* from serving again, on producing to you a *certifi-* "*cate** of their former attendance, yet, I think, that the "Judge at *Nisi Prius* would not be inclined to fine the "officer who had *not*† nominated them.

"I remain, Dear Sir,

"Your obedient humble servant,

******.

Temple, March 10, 1808.

CHAP. VII. Advice from Lincoln's-Inn.

§ 1. *This Letter, why introduced here.*

THE *authority* of the learned gentleman, who dates from *Lincoln's-Inn*, stands upon a footing very different from that of his learned brother, who dates from the *Temple:*—a very different footing—and it must be confessed, a very inferior one. Both luminaries are indeed alike eclipsed by stars ****: and, by this common occultation, both are placed in the scale of authority thus far on the same level. But the Templar, whose "*observations*" are so "*perfectly just,*" is by this adoption, become the child of, or rather *quoad hoc* one person with, the pre-eminently learned Judge: to the purpose of the present enquiry, he is in effect *Lord*

* *Excused.... on producing a certificate.*] Sage advice, still in the same stile. Excused, you may perhaps be from attending to receive a guinea or several guineas—excused, on condition of producing a certificate, the endeavour to produce which might or might not succeed, and in case of success would produce, without the guinea, more trouble than the attendance.

Here, as might be expected, we see another lawyer's remedy.—I don't mean *a remedy proposed by another lawyer*—I mean another remedy, of the sort of those which lawyers are in use to make up and administer;—of that sort which they have in store for their clients, in the character, whether of *consultants*, or *suitors*. Bad indeed must the disease be, if the remedy they have to administer be not worse. And so happily as well as ingeniously have they managed, as not to have left, even at their own disposal, any good ones.

† This insertion of this word [*not*] seems to be a slip either of the pen or of the press.

J. B.

Chief Baron: while his learned brother on the other side of Fleet-street, less fortunate in the *date* of the application made to him, missed thereby the having been admitted to so much as a chance of so honourable an advantage.

Why then introduce him, or his letter, here? says a natural question, and by no means an irrelevant one. The answer is—because it is upon the evidence of this gentleman that the *existence* of the *Guinea corps*, and the *notoriety* of such its appellation rest.

As to his *title to credence*—a remark that has been made already, is—how improbable it is, that if a matter of fact, stated as notorious, were not really so, it should be mentioned as such by a professional man circumstanced as this gentleman appears to be. True it is, that from the mention made by him of this *Guinea corps*, a suspicion might arise, that feelings were harboured by him, heretical and rebellious, as towards the powers that be: and that it was for the gratification of these wicked feelings that he had trumped up this story about the Guinea corps, that statement having in fact no truth in it.

But, for the clearing of *his* character, in which, so far as concerns *evidentiary trust-worthiness*, the character of *this enquiry* is, in some measure, involved, I feel it incumbent on me to shew, which I shall do in proper place, that in his feelings—I mean in the feelings manifested in this his letter when taken in all its parts—there is nothing that does not harmonize with the purest jurisprudential orthodoxy: which being the case, it would be an injury done not only to this argument, but to the reputation and prospects of the gentleman himself, whoever he may be, if any suspicion were left unremoved, of his having any thing in common, but the formal place of date, with any such reprobate as the author of *these* pages.

Not but that in this busy age, in which reform, as in the days of *Balak* and *Balaam, prophesy*, is become contagious, *he too*, (I mean the learned and practising gentleman) as will be seen, is a reformer. But then his plan of reform is (as will also be seen) in the stile of the *Perceval* school, a *temperate* one: meaning by *temperate*, a remedy, which shall either leave the disease as it found it, or by the blessing of the almighty! (meaning the almighty of the *No-Popery* worship) make it worse.

After the necessary preface follows the learned letter *in hæc verba*, with a few occasional *elucidations* by another hand.

§ 2. *The Letter with Annotations.*

" To Sir Richard Phillips.

" *Lincoln's-Inn, Sept.* 1, 1808.

Dear Sir,

" Inclosed you will receive the Act relating to the sum-
" moning of Juries on trials at *Nisi Prius*, and *the three let-*
" *ters** with the perusal of which you have favoured me.

" In respect to the *Act* itself, it appears to have been
" passed with the sole intention of relieving those who are
" liable to serve on juries, from the inconvenience which
" they were before subject to, from their constant liability
" to be summoned from term to term, without any consi-
" deration or respect paid to the labour of their previous at-
" tendances, and it is most clear that *it did not originate in*
" *any jealousy*† entertained that men so summoned and

* *The three letters.*] These must evidently have been the three letters above reprinted, in so many preceding chapters. *viz.* 1. the letter dated from the Temple; 2. Sheriff Sir Richard Phillips to the Lord Chief Baron; 3. the Lord Chief Baron's answer to the said Sir Richard Phillips.

† *Most clear that it did not originate in any jealousy, &c.*] Here we see the first of the evidences above alluded to, by which the purity and simplicity of these learned eyes stand demonstrated. Not only are they (as we shall see presently) inaccessible to any suspicion-exciting ray capable of being emitted from any other source, but, when the tendency of an Act of Parliament might be to excite any sort of suspicion capable of pointing itself towards the higher powers, they are inaccessible to the very first words of the Act.

The Act, I mean the earliest, the most efficient, and by far the longest, of the four or five Acts which bear upon the subject, (3 Geo. 2. c. 25.) states, in the very first line of it, as the very cause of its enactment " the evil practice used in " corrupting of jurors:" and it is with these words before him (or why were they not before him?) that to this learned person " it is most clear that it did not originate in any jealousy entertained that men so summoned and serving, would " fail to act uprightly between the parties." No: the intention, " *the sole in-* " *tention of it,*" is stated by him as being that of mitigating the sort of vexation which, the instant a perception arose that the breast of a *gentleman* stood exposed to it, made that deep impression, which we have already witnessed, on the feelings of the learned Judge.

What is possible indeed is—that the Act which at that moment lay before that gentleman was—not the very Act above-mentioned, but another of the next year; *viz.* that of 4 Geo. 2. c. 7. But this last mentioned statute, being but a patch put upon that other of the year preceding, is so indented into it, that to any one who had not taken the trouble to turn to the amended Act, any self-satisfactory conception of the amending Act would be plainly impossible.

By the Act of the 7th Geo. 2. c. 7. § 2. after reciting that by the Act 3 Geo. 2.

" serving, would fail to act uprightly between the parties.*

" Mr. ***, than whom no man can be better informed " on the subject, is perfectly clear and correct in his ob- " servations,† and in his statement of the manner in which " Special Juries are struck.

" *One circumstance* ought to be attended to, which *must* " *remove all suspicion*‡ on this subject: it is this, that Spe-

c. 25. it had been enacted, that " no persons shall be returned as jurors to serve on trials at *Nisi Prius*" " who have served within.... two years before.... in any " .... county".... except as excepted; and that " by reason of the frequent " Sessions of *Nisi Prius* in the... King's Bench, Common Pleas, and Exche- " quer at Westminster, the said provision cannot be put in execution in the " County of Middlesex, but is found impracticable"—it is (after this recital) enacted, that " the said recited clause.... shall not.... extend to the County of " Middlesex." Then, as to *that* County, it goes on and enacts, that " no per- " son shall be returned to serve as a Juror at any Session of Nisi Prius in the " County of Middlesex, who has been returned to serve as a Juror at any such " Session of Nisi Prius in the said County, in the two *terms* or *vacations* next " immediately preceding"——" under such penalty upon the sheriff, under- " sheriff, bailiff, or other officer, employed or concerned in the summoning or " returning of juries in.... Middlesex, as might have been inflicted on.... any " of them for any offence against the said recited clauses."

* " *Between the parties.*" *Note of Sir Richard Phillips to these words.*] " It " should be observed, that the persons who serve on Special Juries rather desire " the employment than to be relieved from it, as they receive a guinea for every " cause; and it is not about causes between individuals on which there can be " any ground of jealousy. So far are Special Jurymen from seeking to be re- " lieved, that, owing to the advantages derived from serving on them, I have re- " ceived, since I have been sheriff, more than a hundred applications from *re-* " *spectable* persons, who, under a mistaken notion that it was in my power, have " wished me to place them on what they called *the Special Jury List.*" " R. P."

† *Mr.* **** *is perfectly clear and correct in his observations.*] Mr. ****: *viz.* the learned gentleman who dates from the Temple · and of whose learning we have already made our profit: *viz.* in the last preceding chapter.

On that occasion, at the head of those observations of his which were so " *perfectly just*," we saw the *lawyer's ballance*, for weighing the value of *gentle- men's* time against the value of *low people's* time: and, with the correctness of these scales, as well as with the several other observations from the same learned quarter, the learned inhabitant of Lincoln's-Inn, is (we here see) no less " *per-* " *fectly*" satisfied than we have seen the pre-eminently learned Judge.

Like causes produce like effects · he who sees one of these learned persons, sees another: he who sees *Bavius* sees *Mævius*. An observation to this effect has been made already: but the occasions for repeating it succeed one another without end.

‡ *One circumstance.... must remove all suspicion.*] Remove it?—from what place? Not surely from any one of these learned bosoms, the door of which, as against all suspicions pointing *upwards*, remains of course for ever closed:—not from any such seat of imperturbable tranquillity, forasmuch as what is never *in* a place can never be removed *out* of it—but from bosoms actually labouring un- der the *green-eyed malady*, such as the bosom of this troublesome and meddling

"cial Juries are struck *under an order of the Court only*,*
"and the practice is for the opposite solicitors to strike out

sheriff. But let us see what this remedy is, which, being swallowed ought to operate as a specific against suspicion: *viz.* in a constitution actually labouring under, or at least predisposed to, the species of *green-sickness* above-mentioned.

* *Special Juries are struck under an order of Court only.*]—add, *the Court never knowing any thing about the matter.* The order (as we have seen) a mere scrap of spoilt and wasted paper —a mere pretence for fee-catching:—a *pretence*, and that a *false* one. *(See Part I. Chap. VI.)* Of *gold*, not of *post*, is the *powder*, by which the malady of *suspicion* is so *regularly removed out of*, or rather *expelled from*, learned bosoms and learned eyes.

Alas! how different the ideas presented by the same object to unlearned ones. By the very document, by which all suspicion had ever stood *excluded* from the *learned* bosom, by this very document it is that suspicion was not only *planted*, but *rooted*, in the *unlearned* one. By this so oppositely working document, what I do not mean is—the visibly existing though in respect of its purport *falsely* pretended, not to say *forged*, order of Court—what I do not mean is that too visible piece of mendacious and polluted paper—what I do mean is the *invisible* order of the Court—the neither *visible*, nor *audible*, nor yet the less perpetually *standing*, and *intelligible*, and *efficient*, and *general* order, continually issued by all the Courts, to the *Master Packers* of their six or seven respective offices, requiring them to choose always *proper* persons, and never any other: *viz.* the *secret members* of the no longer *secret list*, which, as we have seen, stand indebted to the *Lord Chief Baron* probably for *existence*, avowedly for *protection* and *defence*.

Look to the Temple—look to Lincoln's-Inn—look where you will—look to what part of the constitution you will—every thing is consistent you will find—every thing is orthodox—among learned gentlemen.

The use of a *Jury* is—to serve as a check to *power*—to power that would otherwise be arbitrary—in the hands of a *Judge*. The use—or at least *one* use—of the House of Commons, is—to serve as a check to power—to power that would otherwise be arbitrary—in the hands of the *Crown*. In the case of the sort of Jury termed a Special Jury, symptoms of a sort of *feveret* were, by this learned gentleman, observed, observed but not confessed, to have been produced by suspicions, imputing to this kind of jury an habitual leaning towards the crown side in crown causes. For the removal of this complaint, a febrifuge of sovereign virtue and efficacy, having been discovered by him in the above-mentioned remedy, *viz. an order of Court*, let us apply it—I mean in *idea*—(for the application of it in substance belongs to, and is with perfect regularity and efficacy performed by other hands) to the case of the *House of Commons.* "One "circumstance (let us say) ought to be attended to, which must remove all "suspicion on this subject: it is this; *viz.* that members "*are struck*" (chosen) "*under an order of Court*" (*viz.* the Court at St. James's) "*only.*"

Now is not *this*—deny it who can—a most composing opiate?—a very specific against all political "*ferments?*"—I mean against all such as are liable to break out *within doors*:—and, if it be good in *either* of the two cases, can it be otherwise than good in the other? And, as to this our learned practitioner, notwithstanding what we have seen escaping from him about the *Guinea corps*, can any doubt be at present entertained to the prejudice of his orthodoxy? and, if he is not *already* an *Attorney-General*, or a *Solicitor-General*, or a *Master of the Rolls*, or at least a *Welsh Judge*, is it not high time he *should* be?

"a name alternately until the list is reduced to the proper "number, so that it must be the fault of the defendant's "own solicitor if he does not obtain a respectable list* for "the trial of the issue.

"If any serious inconvenience were to arise from the "present practice of striking and summoning Special Juries "in Middlesex, I apprehend that it is the proper *province* "*of the Courts* above *to* interfere and *introduce a reform*, "without the interference of the Sheriff who has, as "Mr. *** states (and in this he is supported by the statute) "nothing further to do with striking of Special Juries than "to attend with the freeholders' book, to enable the parties "before the proper officer to fix upon such as are to be re-"turned for the trial of the cause, and named in the dis-"tringas.

"As under these circumstances the sheriff cannot, by any "possibility, in my opinion, be subject to any penalty for "summoning the jurors named in the *distringas*, although "they may have before served within the time limited in "the general Act; I do not think that the objection which "you have taken is deserving of your further attention, but "if you think it otherwise, the proper mode of obtaining "the opinion of the Courts on the subject is that which is "pointed out by Mr. ***.

"There is *one reform*,† however, which I conceive to be

* *Fault of defendant's solicitor, if he does not obtain a respectable list.*] Alas! what a smoke is here! But can so much as a puff be necessary to dispel it?---Respectable? yes: in one sense at least, of any want of respectability there cannot be any fear: *viz.* of that sort of respectability which has *office* and *guineas* for its makers. Of that sort of respectability there is not among the candidates any absolute want, even before admission into the office: and this qualification, the guineas, if they did not *find*, would *make*. Here then is the respectability which not only does not stand in need of any exertion on the part of the defendant's solicitor to obtain it, but which, spite of his utmost exertions to the contrary, will be sure to be obtained, and constantly obtained.

Impartiality---security against all influence---all corrupt influence---descending from above?---Is *this* the true English translation for the "*respectability*" of this so learned, and *yet*, or *thence*, so charitably thinking and confiding gentleman? ---*Eight-and-forty* persons, all named by, or under the influence of, the powers above, and the faculty of discarding no more than *twelve* of them a security by which, according to this learned gentleman's necessitarian theory, "*all suspi-*"*cion*," *viz.* of any want of "*respectability*,"---of "*respectability*" (in *this* sense must we say?) "*must be removed?*"

Patients, 48:—and all 48 expected to be cured by a remedy which applies to no more than 12? Were the learned gentleman a physician would this be his stile of practice?

† *There is one reform, &c.*] *Reform?* and from a bosom from which all suspicion that points *upwards*—all suspicion of the possibility of any need of reform---has been sentenced to be transported for life?---

Gentle reader, patience. The reform is of the *temperate* kind---compose yourself. "*Wholly in the Sheriff's power*," says the learned inventor and adviser of this reform. *Wholly out of my power*, (in the note we shall see to this same letter) says the *Sheriff*: and so accordingly (as we have seen, and shall further see) says the *Act*.

With all his dispositions to find "*perfectly correct*" whatever came from above, or came recommended from above, it may be suspected of this learned gentleman, that he was---not completely in the secret. To the *permanence*, so decidedly approved and effectually protected by the learned Judge, he sees not indeed the shadow of an objection: yet the sort of persons who, *beyond all others*, could be depended upon, not to say who *alone* could be depended upon, *viz.* for constancy of attendance, and for that obsequiousness without which constancy of attendance would have been of no use, these are the sort of persons whom so *hardheartedly*, as well as *inconsistently*, we see him thus devising plans for getting rid of: though, to be sure, if, while he was thus giving the advice, he knew it to be an advice that could not be pursued, as he must have done had he looked at the Acts on which he grounded it, "*the case is altered*," and both these imputations vanish.

As to the question just mentioned, between the sheriff and this his learned adviser, it stands thus:

The statute 3 Geo. 2. c. 25. is the only one that has any bearing upon the subject: and, upon the ground of this statute, the matter stands thus:

1. By § 17. "where any Special Jury shall be ordered by Rule of any of the 'said Courts to be struck *by* (here it is "*by*" not "before") the proper officer of 'such Court.... the Sheriff.... shall be ordered by such Rule to bring.... be-'fore such officer, the books or lists of persons qualified to serve on Juries.... 'out of which Juries *ought* to be returned by such sheriff.... *in like manner as* '*the Freeholders' Book hath been usually ordered* to be brought, in order to the 'striking of Juries for Trials at the Bar.... and in every such case the Jury shall 'be taken and struck out of such books or lists respectively."

And in what manner, on the occasion thus alluded to, had the *Freeholders' Book* been usually ordered to be brought for the purpose so alluded to? This is among the points, in relation to which the lawyers concerned in the putting together this piece of patchwork took care, according to the custom among lawyers, to leave us in the dark. For, as often as, by the cry of any part of the injured people, they have been forced to make a show of affording relief against this or that part of the system of judicial abuse, organized by, and for the benefit of, the Judges, one of their maxims is—to leave the *common alias unwritten* law of their own making to form the *groundwork*, applying to it no more than here and there a patch of *statute* law: that thus the *uncertainty*, which forms the essential character of the *groundwork*, may spread itself over the *patch*.

2. In § 1. and 2. of this same Act, directions had been given for the making up of "*Books*" containing *lists* of persons qualified to be returned to serve on Juries: and this without any distinction mentioned as between Common and Special Juries. In that section (§ 17.) by a reference made from it to these two former ones, (§ 1. and 2.) nothing (it would seem) would have been more easy than to say—that the Books, made up according to the direction given in these two sections, (§ 1. and 2.) are the Books here meant by "*the Books*" which here, for the purpose of nominating persons to serve on *Special* Juries, "*ought* "*to be returned by such Sheriff*."

But, by an understanding among the lawyers within and without both Houses, and the clerks within the same, and the *Speakers* to whom belongs the nomination of the said clerks, matters have all along been settled, in such sort that, be the statute ever so long, it shall be impossible, otherwise than by words of *vague*

description, to make any *reference*, *from* any part of any statute, *to* any part of the *same* or *any other* statute.

In the printed editions (it is true) we see each statute divided into *sections*, and each section *numbered*. But *this is* the work of the *printer* only or *his editor:* and a man who, in the penning of any fresh statute, should, for the purpose of making a reference to any preceding statute or part of the same statute, be unguarded enough to make use of any part of the *numeration table* in the description of such preceding statute or part of a statute, would find himself overwhelmed, with expressions of rage and terror, excited by so fee-checking an innovation—rage and terror, covered by a mask of contempt, as if excited by the contemplation of his *ignorance*.

For on the one hand clerks being paid for *copying*, according to the multitude of statutes and the length of each, and the confusion thus organized in each producing a perpetually increasing demand for more—lawyers, on the other hand, being, *some* of them, paid in like proportion for the *drawing* of statutes, and *all* of them having every thing to gain by the *confusion* that pervades the substance of the *several* statutes, and the *universal* and perpetually increasing *uncertainty*, in which that confusion beholds its fruit—hence this rule, by which it is provided, that an *Act of Parliament*, let it of itself constitute ever so considerable a volume, shall, like the mathematician's *point*, be a thing *without parts*, is a rule as sacred among these several learned and official persons, as any article in the 39 ever was to the most orthodox of the Right Reverend Prelates, that grace and sanctify the Upper House: and, whoso should propose to abrogate it, would thereby become a worse than a popish or other *ipso facto* excommunicated convict—a malefactor *ipso facto* convicted of jacobinism.

In regard to this *article*, symptoms of heresy have now and then, it is true, been manifested, in the Commons, in so high a quarter as the chair of the present Speaker: (See Speech of the Right Hon. Charles Abbot on *Mr. Curwen's Purity of Parliament Bill* in Cobbett's Register for June 10, 1809, to which, former manifestations of the like complexion might upon search be added) but in this heresy there is so little of contagion, that the British *Themis* seems little more in danger of being healed of her habitual vertigo by this one hand, than the Church of Rome was of being purged of her errors by the *Pope*, who, about the middle of the last century had acquired, some how or other, the surname of the *Protestant Pope*.

"The *Books or Lists* of persons qualified to serve on Juries.... out of which, "according to § 17, Juries *ought* to be returned by such Sheriff," are they then the same *Books or Lists*, the manner of making up which is prescribed by the two first sections of this same Act?—Vague and incompetent as is the mode of description, it seems difficult to conceive, how, if called upon to give by his interpretation, an answer to this question, a Judge could avoid answering it in the affirmative.

If so, what the Sheriff, in his above-mentioned, and herein-after printed, Note (p. 190.) on this part of the advice of his learned advisers, observes, in relation to this matter, is correct: *viz.* that it is not "in the power of the Sheriff"—of any Sheriff—to do that which by this his learned adviser this Sheriff is advised to do, *viz.* "to correct "the *Freeholders' List* by *expunging*.... names." For, if *the Books*, a description of which is given in the above-mentioned two first sections —and of which it appears that they are the only sort of Books to which the appellation of "*Freeholders' Book*," employed in this 17th section, can apply—are really the Books that, under this same 17th section ought "to be brought before the said "Officer"—(to wit the *Master Packer* of such *Office* in such *Court*)—to serve for the striking of Special Juries, these are Books, of which in § 2. it is provided, that they shall respectively be made by the "Sheriff," who "shall....

"take care that the names of the persons contained in such *duplicates* shall be "*faithfully* entered alphabetically.... in some book.... to be kept by him.... "for that purpose."—"In such *duplicates*" says the Act · of which sort of instrument here called a *duplicate* it is to the present purpose sufficient to observe, that it is an instrument of *somebody else's* making, and not of *his*, *viz.* the Sheriffs: and whether, had Mr. Sheriff Phillips, in pursuance of the advice herein given to him by this his learned adviser, "*expunged*" *any* of the names contained in such duplicate, the "names....contained in such duplicates" would have been "*entered faithfully*," may be left to any man to pronounce.

A course indeed, which might be taken without much difficulty—I mean *physical* difficulty—is, after *entering* the names "*faithfully*," to pursue the advice given by this learned adviser, and accordingly, either once for all, or *toties quoties*, to "*expunge*" names. But whether, after any such purification or number of purifications performed, the book presented to the Officer of the Court—*viz.* the Master Packer, as and for the *freeholders' book*, could with propriety be said to be *the freeholders' book*, is another *curious* question, which howsoever curious, and to those who would be paid for playing their parts in the trial of it, an agreeable one, I would not be the man to advise any other man to cause to be tried at *his* expence. It is one of those questions, in respect of which it is difficult to conceive how, in case of its being tried, for example, on an *indictment*, a Chief Judge, in his endeavours to persuade either a Jury, even though *unpacked*, or his fellow Judges, to decide—either for the King or for the defendant, whichsoever happened for the moment to find most favour in his sight---could experience any difficulty· and as for this our reforming Sheriff, supposing him, in pursuance of this learned advice, to have become such defendant, what sort of favour he could reasonably expect at the hands of the learned Judge who, in that case, would have the trying of him, may be left for him to imagine from the *excursion* which, in the case of *Carr against Hood*, was made not long after by that same learned Judge *viz.* if not for the *purpose*, to the *effect* of giving him a sample of it in the character of a *witness* · always remembering that, of such purification, if performed with any degree of consistency and steadiness, the *effect* would be, as in his instance it had been the declared *object*, to make things *better than well*; and in so doing to destroy not only the *works*, but the very *principle*, of that elegant art---that branch of the art of *design*---which exercises itself in the *grouping* of Jurors:---an art, the planting and cultivation of which has already been affording so much occupation to the *wisdom of ages*.

The case is---that the statute in question, having, like most other statutes, been penned, as above, for the express purpose of being misconceived, has, in pursuance of that purpose, been put into such a form and method, that, both the learned adviser and his official client and corrector, found it more easy and pleasant to speak from *imagination* than from the *Act*.

It was the imagination of the learned adviser, that presented him with the idea, of its "being *wholly* within the power of the Sheriff 'to correct the list" in question, by "expunging names" out of it. It was the imagination of the Sheriff, that presented *him* with the idea, that "to make any alteration in the "returns" is not merely "forbidden," but "forbidden under a '*penalty*,' and "that a heavy one."

As to the *omission*—and let us add *the expunction*---of names, of the description in question; *forbidden* it may indeed be said to be, though in the rather indirect way we have just been seeing, *viz* by requiring that the names of the persons contained in such duplicates be *faithfully* entered: but, to the offence of which this indirect description is given, *no* penalty is attached.

In the next section, it is true, *viz.* § 3. comes a clause, by which a penalty is

"wholly within the power of the sheriff,* and that is, to
"correct the freeholders' list, by expunging the names of
"all such persons who, from low situations in life have
"crept into a little independence, and by artifice and collu-
"sion with the inferior officers, get their names placed
"upon the freeholders' lists with the proper additions, with
"a view principally to their adding to that independence†

appointed. But the offence to which this penalty is attached, is---not that which consists in the *leaving out* of a list of the sort in question, a name which ought to be *in* it, but in the *putting into* it, or at least *acting* as if there *had been* put into it, a name which ought *not* to have been in it.

Then, as to the "*heaviness*" of the penalty, if the real and effective weight be here in question, *viz.* the weight of it as estimated by the quantity of money which the levying of it takes out of a man's pocket---if this be what our Sheriff had in view, very inadequate was (speaking with respect) the conception entertained by him, for the moment at least, of the real and effective weight of statute penalties. Of the penalty here in question, the *minimum* is no more than forty shillings, and the *maximum* but 10*l*. But even this 10*l*. if 10*l*. it be, is not to be levied but "upon examination in a *summary* way" (§ 3.) in the manner herein intimated. in which case, at the expence of 10*l*. at the utmost, he would have it in his power to exonerate himself of any further demand on this score: whereas had the penalty been no more than 1*s*. to which in this case he would hardly have given the denomination of a "*heavy*" one---this single shilling being to have been recovered in a *regular* way, I for my part would not be the man to save him harmless for ten times the *maximum* of 10*l*.—no, nor for a good deal more.

What will be *amusing* enough—and, to any man in whose bosom the interests of mankind are wont to excite any warmer sympathy than the interest of Judge and Co., *consolatory*, is—to observe the two traps set for the unlearned man, one by each of these his two learned advisers, and his unlearned good sense saving him from both.

To make "application to the Court," *viz.* in the only proper manner (learned gentleman fee'd and so forth) but *without any ground for it*, is the learned advice given from the *Temple*.

To get himself *indicted* or *informed against* before Lord Ellenborough—(mark well before *Lord Ellenborough*)—indicted for *an attempt to commit a reform*, *viz.* by *cutting* up the most valuable branch of the packing trade—indicted, and this with at least a plausible ground, say rather a *good* ground to build a conviction upon.

After all this learned advice, including the pre-eminently learned hint not to risk his reputation for "*discretion*," by any such attempt as that of "making "*us better than well*," the unlearned person took a course which assuredly would not have been advised by any of the three, and laid bare the whole matter to the public eye.

And here we see matter not only of satisfaction, in respect of the escape made by the *bird* from the *snares* set for him by both *fowlers*, but of gratitude for the instructive song in which he has sung of it.

* "*Power of the Sheriff.*" *Note of Sir Richard Phillips to these words.*] "This "is not in the power of the Sheriff, who is forbidden to make any alteration in "the returns, under a heavy penalty." "R. P."

† *With a view.... to.... their adding to that independence.*] Receipt for add-

"by the fees payable for their serving on Special Juries:
"*I know several* of this description who are ludicrously
"described as being deeply concerned and interested in the
"*Guinea Trade*,* and a diligent scruting, with the assistance
"of the returning officers, might lead to *this reform.*

ing to independence —Solicit and solicit, till you have succeeded in getting into a situation of profit, out of which, without a moment's warning, for any thing or for nothing, you may be let drop at any time, without possibility of complaint and without knowing why or wherefore.

What minister, or other man in power, is there, who, on the part of all sorts of men, whose functions are said and supposed to act as checks to his own, would not be content to see "*independence*" not only thus "*added to*," but, if after such an addition there could be any thing more to add to it, thus rendered complete?---A system of this sort would be not less efficient (and how much more decent would it not be?) than the giving licence by act of parliament, to all contracts whereby a member sells himself to a minister---licence and protection, on condition that the terms employed in them shall not be "*express*."—(See the Perceval Parliamentary Purity Act, 49 Geo. 3. c. 118. § 3.)

* *Deeply concerned and interested in the Guinea trade.*] *Imprudence--treachery---telling tales out of school*---such are the reflections, which by a man, of more warmth and learning than candour or reflection, might be apt to be cast upon the disclosure thus made by our learned adviser. Against a load of imputation, which, though to a first glance not altogether without colour, will on an impartial examination be seen to be not more serious than groundless, it would be ungenerous at least, if not unjust, to leave him altogether without defence. If of the *appellation* (Guinea-man) and of the habits and dispositions which it imports, the existence were really notorious---notorious in any such degree as that in which he understood them so to be---on this supposition, to have kept them from the knowledge of a Sheriff, and especially so active and inquisitive a Sheriff, and one to whom, in less than a twelvemonth, the number of applications made for situations in this very corps amounted to above a hundred, (*Phillips, p.* 173) would have been altogether hopeless: while, by the frankness of the communication, all suspicion of wishing to throw a veil over the practice was, in the most promising at least, if not altogether effectual manner, obviated.

Between *Judges*, *Master Packers*, and *Guinea-men*, all suspicion of any thing like an *understanding* was, in this refined and *indirect* way, much more effectually repelled, than it could have been by any *direct* arguments: since, of any such arguments, the effect would have been, in the first place, to bring forward an idea, which could not be too carefully kept out of sight: *viz.* the idea of a state of things, the existence of which would if once made matter of argument, be much more likely to be confirmed by it than disproved.

Against *reform* in every line, it begins to be discovered, that much more effectual war may sometimes be carried on by *adoption*, than by open opposition. In a very high place, indeed, go almost when you will, you may hear the abuses of the law not only acknowledged, but inveighed against:---just as if any thing but *will* were wanting to the removal of them;---just as if in the whole world of law there were any one thing of which the learned orator had any tolerably clear conception, except the value of those same abuses;---just as if the most mischievous of those abuses were not the food on which himself, and his closest connections have grown so fat upon;---just as if they were not dearer to him than the apple of his eye.

"I do not, under this last observation, mean to insinuate 'that even such characters *acting upon oath* are likely to *do* '*wrong*,* or that they do not possess sufficient powers of 'discrimination to *decide rightly*; but I think that the spe- 'cial jury fees *should be received only in the way of compen- 'sation* for actual expences and loss of time, and not as 'matters of profit.†

* *Likely to do wrong.*] The faith of this learned person in the virtue of an oath is truly edifying. Unsanctified by this principle of sanctification, the probity of these Guinea traders does unquestionably not appear to have been set by him at a very high rate: give them an oath to swallow, every impure property is, by this consecrated vehicle, carried off. Note that the oath by which the swallower is rendered thus unlikely "*to do wrong*," is the very oath, which, as often as any difference of opinion has place among the *elect twelve*, is regularly productive of *perjury*; of perjury on the part of some portion of the number from *one* to *eleven* inclusive: I say of perjury; unless it be supposed, that, by that terror of inevitable and insupportable torture by which the will is subdued, the understanding is enlightened and converted; and that of him whose power of endurance is the weakest, the conviction and conversion is regularly and proportionably the most sincere. An oath "preservative against corruption!"—an oath composed of vague and unbinding generalities, such as those of which such effectual care has regularly been taken that it *shall* be composed!

Alas! by what fatality did so simple an expedient escape the piously scrupulous and learned mind, that has the royal conscience in its keeping---so cheap a defence of nations against corruption---as the advising his Majesty to give to the department of the Commander in Chief the benefit of a pledge of purity, correspondent to that by which, in the *judicial* department, the difficulty of "*doing* "*wrong*" has been rendered thus extreme!---*The person whom you shall nominate to an office within your department shall, in every instance, be, in every respect, the person the best qualified for the filling of that office---So help you God.* With such a security, the child in leading strings might have been trusted with a commission as safely as his father, and the wiles of Mrs. Clarke would have had no more power over the virtue of the Commander in Chief, than those of *Dalilah* had over Samson before his hair was cropt.

† *Not as matters of profit.*] The severity of the learned gentleman's virtue has, upon this occasion, displayed itself in an opinion, which it is somewhat easier to admire than to understand. That a declaration, to the effect in question, should be incorporated into the purity-securing oath....? is *that* what he means to recommend? *I A.B.* (for example) *do declare, that the guinea just received by me has been and is* "*received only in the way of compensation for actual* "*expences and loss of time, and not as a matter of profit. So help me God.*" Or if duly construed and put into a *tangible* shape, would the proposed security be found to amount, for example, to something to this effect? *viz.* that on a *motion*, *regularly* made by some learned gentleman, opposable or unopposable by learned gentlemen on the other side, a rule should, if the Court think fit, be with equal *regularity* made, ordering that *an account be taken by the Master,* "*of the actual expences*" *incurred by each Special Juryman, viz, in the shape of* chaise-hire, *and* subsistence *upon the road, as also of the* "*compensation due* "*to him for loss of time;*" *with a direction to allow out of the guinea* (being the greatest sum allowed by the Act) *no greater sum than shall be sufficient to cover*

CHAP. VIII. MAXIMS, CONCERNING REFORM, DEDUCED FROM THE ABOVE LETTER.

§ 1. *The Maxims themselves.*

THE subject of *Reform* being at present on the carpet, and a variety of opinions afloat, a few *maxims* or *aphorisms*, half a dozen or thereabouts, and containing the substance of so much of the above learned dissertation as regards that subject, may, perhaps, in these unsteady times, be found not altogether out of season.

Lest the eye of the reader's mind should find itself incommoded by too strong a blaze of light bursting in upon it at once, to prepare it for the brilliancy of the more grand and comprehensive principles, I place in front a rule or two confined in their extent to the only subject that belongs directly and necessarily to these pages—*viz.* the institution of *Special* Juries.

1. When, for the execution of a plan repugnant to the acknowledged principles of the constitution, and to the equally acknowledged injunctions of an act of parliament, 48 persons have been selected, of whom, for the insuring the success of that plan, 12, or upon occasion a single one, are in every individual instance sufficient, the faculty of discarding 12 out of the 48 will, if lodged in proper hands, be, in every such instance, sufficient to defeat it.

For (says the Lincoln's-Inn Letter) " one circumstance " ....must remove all suspicion on this subject:....Spe- " cial Juries are struck under an order of the Court only " ....so that it must be the fault of the defendant's own " solicitor, if he does not obtain a respectable list for the " trial of the issue."

2. If, in the instance of a set of men of whom (except their being in possession, each of them, of a portion

such " actual expences," together with such " due compensation" as aforesaid:—costs of the application to await the Master's Report.

The latter I give as being more particularly in unison with the *general* spirit and tendency of such *amendments* of the law as are to be found in the statute book, made at the suggestion, or in conformity to the advice, of the gentlemen of the long robe. But as to *this* opinion *in particular*, whether it be in legal *religion*, as in the first case, or in legal *practice*, as in the last case, that the truest interpretation is to be sought for it, must be left for the reader to determine.

property which may be insufficient for the maintenance of any one of them) nothing more is known than that they are, all of them, pensioners during pleasure under the authority on which *theirs* was intended and *is said* to serve as a check—if, in the instance of a set of petty placemen so circumstanced, there be any cause of apprehension, lest, on any occasion, they should manifest, as towards that authority, a degree of obsequiousness inconsistent with probity and independence—in such imaginary case, a sort of *sanction* which, as often as any real difference of opinion has had and continues to have place among them, is trodden under foot, would as against such danger, or cause of apprehension, afford a sufficient security.

For " I do not" (says our learned adviser) " mean to insi-" nuate, that even such characters, *acting upon oath*, are " likely to do wrong:" " *such characters*," *viz.* persons who, by this same learned gentleman have just been described as " persons who from low situations in life, have " crept into a little independence, and by *artifice* and *collu-" sion* with the inferior officers, get their names placed upon " the freeholders' list, with a view principally to their add-" ing to that independence by the fees payable for their " serving on special juries."

3. If, in the whole expanse of the all-perfect system, it were possible that a particle of imperfection should any where be found, the imputation, in so far as it were just, would fall—*no* part of it on the *most* powerful, *every* part of it on the *least* powerful of all the classes that could be found concerned in it: no part of it upon those under whose eye, and by whose authority, every thing is done that *is* done, every part of it on those whose *dependence* on that authority is complete and absolute.

Accordingly, in the instance of the only *reform*, which is represented as lying within the *power*, of the only person in whose instance any *inclination* to that effect has been perceptible, the " *reform*" suggested consists in the " *expunging " the names of all such persons who from low situations in life " have crept into a little independence:*"—Thus far the suggestion of the learned reformer: for the due understanding of which it is necessary to be considered, that the consequence would be (nothing less being sufficient to insure its continuance) that if in numbers sufficient for the purpose, persons sufficiently adapted to the purpose were not

found remaining, other persons of the necessary complexion, and in sufficient number, would of course be taken in to fill up the gap.

4. Every man—so he be *high* enough—is *a proper*—and except others seated on the same level, and linked with him in the bands of the same interest, *the only proper*—judge in his own cause.

Accordingly, as we have seen, " it is the proper province " of *the Court above*," (says our learned reformer who dates from Lincoln's-Inn) " to interfere and *introduce a* " *reform*."

5. The hands by whose *industry* abuse has been *created*—by whose *steadiness* it has been *preserved*—and by which, whether created or only preserved by them, the *profit* has been, and continues to be, *reaped*—these are the hands at which the *extirpation* of it is to be sought.

6. When, for example, as long as he has been sitting on his bench, a Judge has been in the habit of treading under foot, with open eyes, the authority of Parliament, the Judge himself is the proper authority to apply to, if you would have him cease doing so; Parliament, not.

For the letter, in which the Lord Chief Baron's determination to persevere in that same habit had been deliberately declared, makes one of " *the three letters with the perusal of* " *which*" (says this learned gentleman to the sheriff) " *you* " *have favoured me*."

§ 2. *Corroborations from Lord Eldon's Scotch Reform.*

Such are the *articles*, which, in substance and effect, though not in words (for words are ever under the command of *existing circumstances*) constitute, so far as the most probable *interpretation*, or as lawyers say *construction*, which I have been able to find for the learned words in question may be found to be correct, part and parcel of *this our* lawyers creed.

I might have said *the* lawyer's creed: for, as already intimated, with here and there a possible exception, too rare at any rate to be to such a purpose worth noticing, being all bred in the same learned school, all cast in the same learned mould, whoever sees *one* learned gentleman sees *all*: nor

are these articles of the number of those, which, to obtain acceptance and adherence, require signature.

Thus much must be confessed—*viz.* that as yet it is only, in so far as the individual learned mind in question can, with propriety, be deemed and taken as and for a fair sample of the genus, that the propositions in question can in their herein alledged character of articles of the lawyer's creed, be with propriety received as genuine.

In that same character, as far as concerns reform of law abuses, can the genuineness of these articles find any man still sceptically enough disposed to doubt of it? Let him turn to the list of *Commissioners for the Reform of Scottish Judicature.* (See Report of their proceedings as printed for the use of the House of Commons, in pursuance of an order dated June 9, 1809.) Let him see with what religious care the name of every person is shut out, on whose part any the least desire to see defalcated any the least particle of abuse from a system composed wholly of abuse, had ever been perceptible; while those of the maintainers and defenders of the whole system are with correspondent carefulness collected and inserted.

Taking, for the basis of his calculation, the number of *two-and-thirty reapers,* let him admire and calculate how rich a *harvest of reward* is destined to be reaped by learned industry, occupied in the field of reform, in the accustomed course of learned husbandry.

From what they have done already let him calculate what they are about to do. Let him pray—if haply into his religion be admitted any particle of regard for the welfare of the people, and the ends of justice—let him pray, that the ministers of such justice may, in the sense most beneficial to the country, be *prevented in all their doings;* that what has been begun in *doubts* may be continued and ended in the same; and that of these doubts, the distribution of the matter of reward throughout the mass of learned merit, may, as being to the country the least bitter, be the only fruit.

Let him behold in idea, and, if so it please him, in black and white, a judicatory,* in which a business occupies as many years as, in another sitting by the side of it,† the same business would occupy hours or perhaps minutes, and these learned persons not hesitating to attach their signatures

* The Court of *Session.* † The *Small Debt Court.*

to an opinion that "the present forms are now, or by the "authority of the Court may easily be rendered, fully ade- "quate for the purposes of justice and *dispatch* of busi- "ness without parliamentary *interference.*" (p. 4.)

Let him behold the signature of the author of *Marmion* annexed—not to a receipt for the profits of Marmion, but—to the produce of the learned labours of this constellation of learned commissioners, so worthy to have chosen the *Præses* whom they chose, so worthy to be chosen, as in fact they had been chosen by that *Præses.*

Let him give thanks, that, to his other offices, the author of *Marmion* does not add that of calling up the *late* Earl, in the forenoon or the afternoon, and telling him what to do, as soon as official advice has been received that the enemy is within his lines.*

After reading, as above, the history of the appointment and proceedings of the commissioners, let him, among the speeches of the Edinburgh Advocates,† under the name of the author of *Marmion*, read a rhapsody of irrelevant buffoonery, in which he will not find a serious word, except what is employed in passing undiscriminating condemnation on every imaginable alleviation of judicial abuse: including, in such his condemnation, every thing which the noble and learned institutor of this commission either *has* given it him, or, unless it were in whispers, *could have* given it him in charge to promote.

In these public documents, including the above-quoted *probationary ode* in prose, which, if *Lord Ellenborough's* ridicule-proscribing branch of libel law were applied to it, would be from beginning to end a *libel*—on these

* Exactly as it stands, this paragraph was written on the 12th of July 1809 being some days *before* the sailing of the Walcheren Expedition.

† Delivered March 1807. Published by *Constable, and Co. Edinburgh*; and *Murray, London.* "The loser.... (he is there made to observe) must be dis- "obliged at the issue of every cause......The winner......sometimes...... "thinks his conquest dear bought....The lawyers....were often irritated, that "the Court did not see with their eyes....Hence the sallies of satire and of scandal....And to these joint causes he was willing to ascribe much of the supposed clamour of the country....and *not to any material defect in our present system....*" Thus far the far-famed poet: whose modesty, when confessing himself "somewhat abstracted from professional pursuits," (*ib.* p. 48.) could not save him from being selected by Lord Chancellor Eldon to carry the above avowed opinions into practice. *Not any material defect in the system!*—in a system to which alone the English system is indebted, for not being perhaps the most profligate system that ever was devised, for tormenting and pillaging men on pretence of justice!

howsoever libellous as yet unpunished documents, having *read* what Lord Eldon *intended* should be done, and having predicted (as any man may do without the gift of prophesy) what *will* be done, let him give thanks, that no one of *Bonaparte's Dukes* is as yet known to have been invited over to replace the *Duke of York:* and that if, by that noble and learned oracle of the cabinet, advice to any such effect has ever really been given, doubts, of the nature of those clouds, which never cease to exhale from the same ever-pregnant source, continue for the present to hang over it.

Accordingly amongst similar articles of information furnished by those same papers may be found this (p. 4): *viz.* that " at a General Meeting" (in Edinbugh) at which " the " Judges of the Court of Session were invited to attend .... " several of the Judges (18 March 1809) assisted....when " the meeting finally resolved, that... the present forms " are *now*, or by authority of the Court itself may easily" (as easily as they always might have been) " rendered fully " adequate for the purposes of justice and *dispatch* of busi-" ness, *without parliamentary interference.* And....that the " late division of the Court....has....*for the present re-" moved the necessity* of any further *innovation* upon the " forms and constitution of the Court."

Finally let him give thanks, if so it be, that no commission, of *Review* or *Revision*, has as yet passed the seals, directed by his Majesty to his trusty and well-beloved James Crawfurd, John Brickwood, Allen Chatfield, *John Bowles*, and Alexander Baxter, Esquires, nominating and appointing them to review and revise, and finally to audit and pass, the accounts of them the said James Crawfurd, John Brickwood, Allen Chatfield, Alexander Baxter, and *John Bowles*.



CHAP. IX. TRANSACTIONS AT THE REMEMBRANCER'S.

§ 1. *The Transactions themselves.*

WE have thus far attended our Knight on his negotiation—an epistolary one we have seen it was—with the Lord Chief Baron. We have moreover thus far seen the fruit of it;—instead of the justice called for, we have seen him

put off with a figure of speech: a *sarcasm* some might call it, others an *oxymoron*, made at any rate out of an Italian *epigram* in the shape of an *epitaph*, and that so old as to have grown stale:—instead of the *fish* prayed for, a *serpent* given, and with a sting too in the tail of it, though perhaps not a very sharp one.

Let us now follow him to the packing office.

Whether it was that the advice couched in the epigram had not as yet been received, or, having been received, the eloquence of it had failed of producing the effect it looked for, so it was that our Quixote Sheriff took the irregular course of doing "*better than well.*" Besides the blame—for such it appeared to him—of acting in the teeth, not only of a principle of the constitution, but of an act of parliament, he saw, or thought he saw, a penalty of 5*l.* for every transgression, impending over his head.—Raw and uninstructed as he was in the practice of *Courts*, led astray by a propensity to innovation, speculation, and the false philosophy of the times, a conceit possessed him that the tide of corruption ought rather to be stemmed than swum with, and that acts of the legislature were designed rather to be obeyed than to be contemned. Misled by theories, Parliament, to his fancy, presented itself as superior to Judges. It was not long before his error stared him in the face.

Under such impressions it must have been that, on a certain day to this compiler unknown,* our Knight presented

* *On a certain day to this compiler unknown.*] Unfortunately as to this point the original memoirs have left us—in the *dusk* at least, if not in the *dark*.—That the *visit* of the Sheriff to the Remembrancer's office was antecedent to the date of his above-mentioned letter to the Lord Chief Baron, seems probable: for, though we are not expressly informed of its being so, yet as the mention made of it is antecedent to that made of the letter, such, in default of more positive information, it seems natural to conclude was the order of the facts. A circumstance indeed by which the force of the inference may perhaps be thought to be somewhat lessened, is—that almost immediately after comes an incident stated as subsequent to the month of July, whereas it was the month of April that closed, as well as opened, that epistolary correspondence. But the former hypothesis may perhaps be found to receive confirmation from another circumstance: *viz.* the symptoms of *pliancy* which, it will immediately be seen, were produced by, and at the time of that visit—I mean the pliancy of that moment, when compared with the restored rigidity of later times.

Before the result of the epistolary application made to the superior was known, the personal application would hardly have been made to the subordinate. Now, in this interval, there was ample time for the communication that would naturally be made of the matter from the superior to the subordinate: and, if any

himself at the busiest of the two Exchequer *packing offices* —the office of the *Deputy Remembrancer*—with the freeholders' book in his pocket: "having previously provided "himself with a list of persons who had served....within "two terms:" *viz.* in the hope of preventing, it practicable, their serving again, till the time should come at which their service would *not* be an infringement of the prohibition certainly pronounced by justice, and supposed to be pronounced by law.

Conceive who can, the surprize of *Mr. Deputy Remembrancer*, when, the figure of the Sheriff appearing before him—and, with the list of over-served Guinea-men in one hand, and the Act of Parliament, instead of a pistol, in the other, advancing upon him—he heard himself called upon, contrary to all precedent, to pay obedience to the law. This was rank innovation: this was plain jacobinism. Meantime what was to be done? The Sheriff with his instrument of terror was present: the reverend Judge, with his instrument of support, his Italian tombstone, was not present.—*Our Felix trembled.*—The existence of the law was recognized, its application admitted, its authority submitted to: submitted to for the moment, though *even then* not altogether without wry faces. During the continuance of the ague fit, the instrument of terror being all the while in view, "*two Juries*" were struck: and "*in striking* them, "the official striker" was, "*to a certain extent*"—though only to a certain extent—influenced by this principle. Of the pockets which, *cause after cause, and* "*term after term*" had been used to come and load themselves with guineas, some, though some only were for the moment kept at home, kept at home for awhile to empty themselves, and make room for others: others made, of course, as nearly as they could be found, of the same materials, and of the same cut.*

Obsequiousness having thus been produced—but in a quarter, and in a direction, very different from that in which

such communication had been made, the compliance, the *unwillingness* of which seems pretty conclusively evidenced by the subsequent rigidity, would hardly have taken place.

* "I attended" (says the Sheriff) "at the office of the Deputy Remembrancer "of the Exchequer with the Freeholders' Book, and had previously provided myself with a list of persons who had served in causes at *Nisi Prius* within two terms. The Deputy Remembrancer *recognized* and *admitted* the force of "the above-recited clause," (4 Geo. 2. c. 7. § 2.) "and, in striking two Juries "at that time was, to a certain extent, influenced by its principle." Phillips, p. 158.

by *law* (I mean by the judicial makers of law) it had been intended, and been accustomed to be produced—a natural object of curiosity will be to know what length of time so extraordinary a phænomenon continued to have place.

The obsequiousness—the compliance continued just so long as the force, by which it had been produced, *viz.* the instrument of terror above-mentioned, continued to be applied. The acting force being removed, *re-action* regained the ascendant. The pliancy lasted but for two *strikings:* the principle of *elasticity* displayed itself, *rigidity* succeeded, and *regularity*, (I mean what in Westminster-hall is meant by *regularity*, *viz.* regular disobedience to law) was restored.*

The cause of this return to regularity and social order, lies at no great depth. Though, between the titular Remembrancer of the Exchequer, and his Deputy, there exists, unless by accident, no more connection than between the emoluments of his principal and the duty on pretence of which the emoluments are received, between the pre-eminently learned Chief of that judicatory, and his subordinate the aforesaid Deputy, the intercourse is necessarily close and intimate.

§ 2. *Instruction gained—Definitions and Maxims.*

Of two things one. Either in this office an Act of Parliament *is* felt in the character of a binding force, acting as a bridle upon private inclinations, or it is *not:* if it *be*, the consequence is—its force having, in the *present* instance, proved *ultimately* inefficient—some *external* force must have been employed in over-powering it; and if so, we see, without much danger of error, what that force *was:* but if *not*—if in that office an Act of Parliament is really *not* felt in the character of a binding force, what in that office is the state of justice?

* "I have since learnt however," (continues Sir Richard from the passage last quoted) "that no regard is paid to the provisions of this clause, and that "the Juries are *still*" (on the 20th of September 1808, the day on which his publication bears date) "struck nearly as heretofore. On examining the list of "persons returned to serve on Special Juries in the Exchequer in the month of "July, I have observed" (continues he) "the name of one person serve in "nine causes, of two or three in eight causes, and of several in seven or six "causes," p. 159.

In that *office*—thence (might have been added) in the *Court under* which it acts—thence again—in the other Courts *in the view of which* it acts:—but of this elsewhere.

Upon the whole, *bench* and *office* together—*doctrine* and *practice* together—doctrine leading practice, practice expounding doctrine—we may obtain—if not exactly that sort of *instruction* and *satisfaction*, which an unlearned eye, unversed in the practice of Courts, might be apt to look for—at any rate a *definition*: a definition, which having for its subject a word of no *scanty extent*, and, (relation being had to its extent, and the application given of it) of no *mean importance*, presents some claim to notice.

Well, considered as a *quality of action*—in any such phrase for example as *acting well*—is a *relative* term, involving in its import an implied reference to the *situation* of the *person* whose *agency* is considered.

On the part of a Chief Judge, notice having been received by him of an Act of Parliament prohibiting a certain *practice*, and the application of the Act to that practice having been deliberately admitted, *acting well* consists in *defending* the practice in black and white, and, after a momentary interruption, produced in another subordinate station by present urgency, *causing* it, or at least *deliberately suffering* it, to be resumed and continued as before.

On the part of a *Deputy Remembrancer*,—an officer occupying an office subordinate to that of the Chief Judge—*acting well* consists in acting, under the direction of the Judge, in the maintenance and support of such supposed prohibited and illegal practice, and, after notice and recognition of the illegality, and a momentary stop put to the practice, resuming it, and with it the habit of considering the authority of a Judge as superior to that of the legislature.

As to *better than well*, in the unanimous opinion of all the commentators, the use of the phrase is a flower of rhetoric—a figure of speech—some might call it *oxymoron*—others *irony;* the opinion intended to be inculcated being the reverse or nearly so, of the meaning which on the face of the literal sense stands expressed. *Ill* is the meaning really intended to be inculcated; so that, upon the whole, the doctrine, meant in and by the epistle in question to be inculcated, may be comprized in two short and well-matched aphorisms or maxims:—he acts *well*, who *violates* the law: he acts *ill*, who either *obeys* it himself, or *calls* upon others to obey it.

PART III.

STATE OF THE PACKING SYSTEM,

ANNO 1809.

CHAP. I. COMMONS' DEBATE, 24 APRIL, 1809. PACKING AND CUTTING.

§ 1. *Abuses touched upon—Packing and Cutting.*

THE 24th of April, 1809, forms a new æra in the history of this art.

Of the state of this branch of business, a corner is now unrolled before St. Stephen: the eyes of the Saint, as in these cases must sometimes happen, especially if the cry be loud and troublesome, half open themselves to the abuse: but then immediately, as usual, close upon it.

Up stands *Mr. Whitbread*, and more or less light is thrown upon parts or supposed parts of judicial practice.

1. *Package of Jurors, viz.* in the offices which we have seen established for that purpose.

2. *Bribery of Do.* doubled: double guineas substituted to single ones.

3. Unobsequious Jurors *dropped:* or, in the fashionable and familiar phrase, *cut.*

4. Where, under the name of the *Crown*, the firm of Judge and Co. is party, *double fees* to Judge and Co.—at whose expence need not be said.

Package—a complex process in which, properly speaking, the operation of *cutting* is included—this, being the very thing in question, will, together with *cutting*, afford two *sections* to this present *chapter: double feeing*—an operation, in *some* respects, *included* under package, in *others*

distinct from it, but, in all respects, connected with it, claims a chapter to itself.

§ 2. *Packing.*

ON this occasion, amidst the uncertainties to which Newspaper-reporting is liable, one thing seems pretty clear, *viz.* that, in respect of *depth* and *extent*, the nature of the mischief was misconceived:—misconceived and under rated, by the Honourable Gentleman, by whose public spirit the matter was thus brought forward. "That the Master of "the Crown Office should have in his discretion the nomi-"nation of juries,"—this is what to him appeared—as well it might appear—"a great hardship." Of the state of things thus spoken of, the description thus given is thus far correct. But when the mode, in which the effect is brought about, comes to be spoken of, *there* it is that the description fails. "Of the persons *summoned on the pannel*, such "names *passed over* as he thinks fit, without calling them on "their *fines*, upon the mere plea that they could not attend, "and *retaining* such names as he thought fit...."*—To apply a detailed correction to the several mistakes contained in this part of the statement, would, after what has been said in the two former parts of this work, be a useless operation: the general result is clear enough; *viz.* that it is by a fraudulent contrivance, and *that* such a one as requires to be renewed on each individual occasion—by *irregular* practice in fraud of the law, and not by the law *itself*, as constituted by the avowed and regular practice of Judges—that the "*nomination*," and nullification, of these supposed and pretended checks upon the despotism of Judges is effected.

Of these errors the origin appears sufficiently obvious. Though in several points not conformable to the view given of the case by *Sir Richard Phillips*, there remains conformity enough to render it probable, that it is from *his* representation of the matter, as given in his book, that that of

* Words of the Report of that part of Mr. Whitbread's speech, as given in the *Times* Newspaper, of the 25th of April 1809---"He thought it, for instance, a "great hardship, that the Master of the Crown Office should have in his discre-"tion the nomination of Juries, by passing over the names of such persons "summoned on the pannel as he thought fit, without calling them on their "fines, upon the mere plea that they could not attend, and returning such "names as he thought fit."

the Honourable Gentleman was taken. I mean the "*pass-* "*ing over*"—and "*upon the mere plea that they could not* "*attend*"—and so forth. By this the conception conveyed (we see) is—that, taken in its totality, the *Gross List* comes into the Master's hands from some *other* quarter: and that all that it is in *his* power to do is—to cause to be *discarded* out of it this or that individual; and that even *that* cannot be done in any case, without a *fresh* as well as *false* pretence: whereas, as we have seen over and over again, the truth is—that of the persons whose names are put upon this *Gross List*, every individual without exception is *constantly* and *regularly* chosen by him, and that if, for ridding it of this or that obnoxious individual, any such pretence should happen to be necessary, it is not by *him*, by that officer, who in regular course nominates whom he pleases, that any such falsehood need be, or indeed could consistently be, averred.

As to *Sir Richard Phillips*, happily for the public he neither was, nor ever had been, a lawyer: on the particular occasion in question, he plunged not—*time* would not have suffered him to have plunged—into any such fœtid mass of *dead* letter, as the labyrinth composed of the *books of practice*. He did—what in his place every non-lawyer would have felt the necessity of doing—he betook himself to the *living oracles* of the law, such as were within his reach: and what their *responses* were has been seen in another place: the point here in question is of the number of those which may there be seen involved by them in some of their gilded clouds.

To what purpose these two paragraphs? To serve as a critique upon a Newspaper?—No: but to shew that the *real* complection of the ulcer is far more angry than that which it then presented to the eye of the Honourable Gentleman: that the real depth of it had not then been sounded by him: and that it continues to call, and with increased energy, for the renewed and more serious exertions of his *healing*, but in the first place of his *probing*, hand.

Had it not been for *irregularities*, as we have seen—some but *supposed*, others, as we shall see, real—the subject, as far as upon the face of this report it appears would never have received a visit from those experienced eyes, which reflect so much useful light on every subject on which they fix. For this, wherever *law* is concerned, is the general error: ascribing whatever is amiss—not to *regular* practice,

but to *irregularities*: not to the *system*, but to A. or B. to whom on this or that occasion, it happens to be acting under it. This is the grand error of errors—supposing regular practice to have had not only *justice*, but justice alone, for its object: whereas it never *has* had justice for any part of its object, nor, in the nature of men and things, circumstanced as Judges have been, ever *could* have had.

§ 3. *Cutting*.

ON the subject of *cutting* and *being cut*, up rises *Mr. Marryat*, and speaks of *one* person, *viz*. himself, to whom, after verdicts given against the Crown, no such accident had happened: and there the *evidence*, or at least the report, as above, given of it, stops.* But, stopping there, it proves nothing. It has already been stated, (Part I. Chap. 4. § 6.) that verdicts after verdicts may be given against the Crown, and to every officer that ever calls himself *the Crown*, the event of the cause be, personally speaking, a matter of indifference. On a question of revenue, where is the Chancellor of the Exchequer—where is the Solicitor of the Treasury, Customs, Excise, Stamps, Assessed Taxes, or any other Board, who, any more than the Honourable Gentleman himself, would wish for a verdict against evidence?

Up already had arisen *Mr. Attorney-General*: and here, in the person of this great Law Officer, may be seen the *prudence* of the *serpent* hiding itself under the *simplicity* of the *dove*. "With respect to the partial summoning of "Jurors, as he himself did not summon them, he would "not" (says the Report) "undertake to say any thing of the "fact from his own knowledge." As to *summoning*, that must have been the mistake of the *Reporter*: *summoning* could never have been the word of the *Great Law Officer*. As to Great Law Officers, what *may* happen to their *science* is—as to mere matters of *fact*, to put on the mask of *igno-*

* *Mr. Whitbread*, as per *Times*.—"Another practice he understood to prevail "was—that *Special* Jurymen, who had been summoned over and over again, if "ever they found a verdict against the Crown, it some how or other happened, "they were never summoned afterwards."

Mr. Marryat as per Do.—"He was frequently in the habit of being summoned as a Special Juror. He had frequently found verdicts as well against "the Crown as for the Crown, and he never experienced any difference on that "account."

rance: what *never* happens to it, is—to misapply law words. *Nominating* is the *word*, as well as the *practice*, here: and to the Great Law Officer in question most assuredly it never had happened to *nominate*, any more than *summon*, a single Juror in the whole course of his life. But, of the *seven* offices belonging to the three Courts, there is not one but what has its officer, (already designated so often by the name of the *Master Packer*) by whom this nomination, as so often mentioned, is regularly and avowedly performed: nor is there more than one, if so much as one there be, that has not its *book* or *books of practice*, in which this *nomination* is regularly mentioned as being so performed.

If the practice of the Courts in which they practise, and the Books in which that practice is delineated, be to such a degree a secret to *Great Law Officers*, can it be wondered that they should be equally so to *lay-gents*, such as *Sheriffs* and *Members of Parliament*?

So much for *ignorance*: the quality of the person considered, I should have said *nescience*: nescience, the *cause* or *accompaniment* of so amiable a quality as *simplicity*. We come now to *confidence*, the *result* and *fruit* of it.

" But he was confident" (continues the Reporter) " that " any officer of the Court, who would venture on such a " practice, would *certainly lose his place*."—Thus far the Great Law Officer.

For my part, the confidence of which *my* ignorance has been productive, is as strong as his can possibly have been: it is, however, of a nature exactly opposite. In *each* of the *seven* offices there is but *one* officer, by whom (unless it be, as we have seen, by his Deputy,—(See Part I. Chap. 8. p. 81.) Jurors are *nominated*;—(I should have said *or are supposed to be nominated;*) and he, (as we have seen) is the officer, who, by whatever other titles, designated to *other* purposes, is to *this* purpose commonly stiled *the Master*. But, were there a hundred of them, there is not one, who, for any such practice as the practice, here, though improperly, designated under the name of " *a partial summoning*" —say partial *nomination*—of Jurors, could, by any *possibility*, be made to " *lose his place*." The nature of the case does not admit of it: the very nature of the case—unless any such odd accident should happen to the officer as that of having an Italian epigram, ready cocked, which he wants to bring down *a reformer* with—the very nature of the case, as we have seen, *excludes all evidence*.—*Stiles*, *Esquire*, for

example, is among those *nominated* by the *Master* in *Easter* Term: *said Esquire* is *not* among those nominated by said Master in *Trinity* Term. Make what addition you please to the number of terms, during which poor Mr. Stiles sees himself *not* nominated, what is there in all this to make the Master, or any body else, "*lose his place?*"—Not that, if the place *could* be lost, it would be any such great person as a *Master*—it would be (as we have seen) some scape-goat or other in the shape of a *Clerk*, that would be sacrificed upon the altar of *Official Prudence*.

No:—this is the grand use and exquisite contrivance of corruption in this shape: *viz.* that, be it ever so corrupt, it is impossible to punish it, aye or so much as to point suspicion to it.—Pleasant conceit indeed! A Master lose his place! In any Court of Common Law, from the days of *Lord Coke*—aye or of "*the English Justinian,*" *Edward the First*—did the Great Law Officer ever hear of so much as a single case, in which, for mal-practice, in this or any other shape, any such personage as a Master ever "*lost his place*"—did he ever hear of so much as the rumour of any such case, to form a ground or so much as a colour for such confidence?

No: this is not the way that *Alma Mater Lex* deals with her own children. *Ah, fie upon it, darling! Dear child, you must not do so any more!*—Do what mischief they will this is the very worst they ever hear from her, if on any such occasion, even in an age or any number of ages, it ever happens to them to hear any thing. Let him look to the statute of Hen. 6th, 10 Hen. 6. c. 4. and see 32 Hen. 8. c. 30. 2 and 3 Ed. 6. c. 32. and 18 El. c. 14. Masters, and their brother officers, with the assistance of feigned plaintiffs of their own feigning, *outlawing* men by wholesale—taking all this trouble, and to no other purpose than that of seizing their estates, and distributing the produce in the shape of rewards for merit: for learned merit, displayed in these same offices by these same acts. Parliament takes up the matter, and what does it? It passes an Act, saying to all these learned persons—"*Go and do so no more.*"

A Master *lose his place* indeed? What? a place that he had purchased—purchased outright—of a Chief Judge? What, if such a thing were to happen, would be the worth of any of these *Masters'* places, not to speak of *Judges'*? *Lord Arden*, *the Earl of Buckinghamshire*, *the Earl of Hardwicke*, *Lord Kenyon*, *Sir William Scott*, *Mr. Perceval*, *Lord Erskine*, *Lord Redesdale*,

the pair of *Honorable Knoxes*, the pair of *Lord Seymours*, *Lord Manners*, *Lord Eldon*, and above all Lords, *Lord Ellenborough*—could it rationally be supposed, that these or any other illustrious persons concerned, whether in the character either of *Incumbents* or of *Patrons*, past present or future contingent, in the security of official situations, would suffer, especially if non-feasance were to be taken as a cause of forfeiture, any such injustice to take place? Where then would be their Lordships plighted faith—the virtually and virtuously plighted faith: plighted by learned Lordships to fair purchasers?

CHAP. II. DOUBLE-FEE ABUSE, PLAIN AND EMBROIDERED.

§ 1. *Ground and Embroidery explained.*

THE distinction requires explanation; and explanation shall be given to it.

Double-fee abuse *plain*—(or, as but for the apparent contradiction, it might have been called, *simple*)—mere waste of public money—nothing worse.

Embroidery to the abuse, *corruption* of *Jurors*, and *contempt* of *Parliament*:—in a particular case, the wasted money, the *second* of *two* guineas, receiving so particular an application as to operate, in the character of a portion of the *matter of corruption*, upon a certain class of Jurors: and this in defiance of an Act of Parliament, *viz.* of a clause (24 Geo. 2. c. 18. § 2.) made for the express purpose of fixing upon *one* guinea—and that not as the regular fee, but as the very greatest fee, that, by Jurors of that description, shall, in any case, be received.*

* *Simple dissipation abuse.* Mr. Whitbread, as per Times. "Another practice he understood to be uniform with Courts, namely, that the Crown always paid to the Officers double-fees."

Corrupt and contemptuous abuse. Do. as per Do. "Further he was informed that where a Special Jury found a verdict for the Crown, it was usual to pay each man two guineas; where the verdict was against the Crown, they received but one guinea per man."

The contempt consists in the violation of a clause limiting the fee to a guinea in all cases: of which clause some how or other, in the speech, no mention appears to have been made.

Words of the Act (24 Geo. 2. c. 18. § 2.) "Whereas complaints are frequently made of the great and extravagant fees paid to Jurymen" (Special Jurymen) "....no person who shall....serve upon any Jury....shall *be allowed* to *take* for serving on any such Jury more than the sum of money which *the Judge*

From the several Crown Solicitors, attached to the several Boards, double-fees to the Law Officers: *viz.* to the officers in the several offices belonging to the several Courts of Justice which they have to deal with:—Judges, in their *own* persons, included or *not* included; in the persons of their officers, whose fees they pocket, or derive a profit from in other shapes, included beyond doubt. And here we see the *plain* and *simple* abuse.

From the same hands, to each special juryman where the verdict in which he has concurred has been in favour of the *Crown*, an extra guinea: where it has been in favour of the party, no more than the *one* guinea: the *extra* guinea being given in the teeth of the Act which *forbids* the giving more than one: and here we see, combined in one rich mass of embroidery, the *corruption* applied to *Jurors*, and the *contempt* put upon *Parliament*.

§ 2. *Double-fee Abuse, plain:—mere Waste.*

But for the embroidery of which it forms the ground, and for the explanation of which the mention of it is necessary, the plain abuse, the mere waste of public money— would scarce be deemed worth a word or a thought *any where:* nor indeed would it be in its place *here.*

As to our Great Law Officer, whom we shall presently behold breaking out into a burst of "virtuous indignation, rising even to *abhorrence*," he had none to spare for a practice so excusable, or rather so meritorious, as that of applying *double-fees* in the shape of rewards of merit, to merit personified in the persons of Law Officers. To these Law Officers; officers, the profits of whose offices find their way in so ample a proportion into the pockets of noble and learned tenants for life, whose *remainder-men* are Great Law Officers. To this charge we have nothing but his silence; nor need any thing more be desired considering the admission it involves.

Thus much then is established: *viz.* that it is become *regular* practice, for the Lords of the Treasury in every cause

" who tries the Issue or Issues *shall think just and reasonable*, not exceeding the " sum of one pound one shilling. . . . " Thus saith the law.

N. B. In practice the Judge never "*thinks*" any thing about the matter. The utmost sum thus allowed to be given in any case being as of course given in every case, he is never called upon to think about it.

instituted by a Crown Solicitor under their direction, to give out of the taxes to every Law Officer twice as much as according to a rate settled by those whose interest it was to raise it as high as possible—twice as much as, even to an estimate thus exaggerated, his services are worth: including, in every instance of an office executed by Deputy, the novice of the principal, by whom the reward is pocketed, without the expence of service.

A list of the law offices and law officers thus remunerated would, in one way or other, be instructive.

The admission might have been as express as words could make it, for any thing that any body could have had to fear from it.

When a *tax* has been called a *tax*, *John Bull* has now and then been heard to grumble. Call the tax a *fee*, he is satisfied: so as the contribution be but imposed by the men by whom it is pocketed, pocketed by the men by whom it is imposed, *Blackstone's* motto is *John Bull's*—"*every thing is* "*as it should be.*" But, if the imposers are Judges, and the persons on whom it is imposed are those children of affliction called *suitors*—patients with emptiness in their pockets, and perpetual blisters on their mind—then it is that he is not barely *contented*, he is *delighted:* (he cries) *litigation is checked:* some men not being able, others not willing, to see, that in this way, wherever there exists a man, rich as well as wicked enough to purchase the power of oppression thus offered him for sale, it is only the honest and injured litigant, or he who, if the ability were left him, would be litigant, that is thus *checked*, and that the dishonest litigant is instigated, supported, armed, by this most mischievous of all taxes, every fee exacted from the other side being an instrument of oppression put into his hands.

§ 3. *Embroidery—Corruption of Jurors, contempt of Parliament.*

We now come to the abuse in which the indignation of the Great Law Officer saw its proper and safe mark: an abuse of former times, supposed to have vanished with the times.

"Further" (says the Report, speaking of Mr. Whitbread) —"further he was informed that when a Special Jury "found a verdict *for* the Crown, it was usual to pay each

"man two guineas; where their verdict was against the "Crown, they received but one guinea per man." Here we see the *charge*. Come we now to the Great Law Officer, and his *answer*.

"Mr. Attorney-General" (says the Report) "in reference "to Mr. Whitbread's assertion, respecting the two guineas "given to Special Jurymen in cases of verdict against the "Crown. . . . [and the usage of discontinuing to summon "Special Jurors who should once give a verdict against the "Crown] utterly denied the existence of such practices in "any of the Courts within his memory."

So far the Great Law Officer. As to the passage included in brackets, it is thus distinguished, on the presumption that, so far as concerns *this* practice, the supposition of an utter denial must, for the reasons already given, (Chap. I. § 3.) have been a mistake.

"He believes indeed" (continues the Report) "the "former practice did sometimes take place, many years "since, in the Court of Exchequer; but had never oc"curred for a great number of years, and it was a practice "which he *abhorred*, as disgraceful to the administration of "justice."

And so there was really a time when corruption in this shape was in use? And this corruption applied to the very class of persons—to the very class of Jurors—which there has been such abundant occasion here to speak of: the very Jurors, CONCERNED, "*deeply concerned*" in "the Guinea trade?" And the corruption had not, as in the case of double fees to *law officers* (meaning, we may presume, *all* the law officers, without distinction, and upon *all* occasions) the praise of *regularity* for a cover to it? No:—it was given to them or kept back from them, according as they had behaved;—according as they *had* or had *not earned* it.

As to the Court, in which this "abhorred" and "disgrace"ful practice" was so recently in use, it is the Court of *Exchequer*:—that very Court, in which, in the opinion of the pre-eminently learned Manager himself, things go on (as we have seen) so well—so "*well*"—that the idea of making them go on "better" is treated by him as something *worse* than needless. It is the very Court, in which recruits for *this service* are received and trained, and their "characters," if not put on *record*, had in "*remembrance*" at least, for *other* services.

And this practice, thus "*abhorred*" by the Attorney-Ge-

neral as "disgraceful to the administration of justice," how came it in the Court of Exchequer, or in any Court, calling itself a Court of Justice, ever, and so recently too, to have place? and supposing it not to have place *to-day*, is there any thing and what, to prevent its having place again *to-morrow?* Whatsoever the causes may be, is there any thing unreasonable in the supposition, that the same *causes* may at any time be productive of the same effects? Not that any such renewal presents itself as a very probable occurrence: for the grand object, *viz. dependence*—complete and absolute dependence—being by this time so effectually secured, as it appears to have been, and in so snug and quiet a way, corruption in any such barefaced shape would be altogether needless; and the danger of and from exposure, remote as it would however be, is more than, by learned prudence, would, when unsweetened by any ulterior advantage, be incurred.

Thus much for the *corruption*. But in the corruption, *bad* as it is, we do not by any means see the *worst* part of the business.

The worst part of the business is the contempt—the open contempt, put upon *Parliament:* disobedience, such as it is impossible, should not have been *wilful*, manifested as towards one of its recent laws. Here we see the axe laid to the very root of Government: and by what hands? Not by *Jacobins* and *levellers*—not by men who meet at taverns, and get up upon *tables:* but by the very husbandmen themselves;—the very nursery-men, by whom *Mr. Reeves's* tree—(the tree that was so near falling upon his head, and without falling on it prepared it for so many good plaisters)—the very nursery-men by whom that nutritious and umbrageous sugar-tree, ought to have been nursed, and who are so well paid for nursing it.

But of this most serious *state* offence—this dissolution-threatening offence—in comparison of which so ordinary and *regular* an offence as corruption shews, in the eye of a *really* loyal subject. but as a peccadillo, more will be said in another place. (See Part IV. Chap. 2.) Be it meantime remembered, that the fact is established.

Other facts, not altogether devoid of importance, remain to be affirmed or disaffirmed by inquiry and evidence.

By what *hand* was it that the *bribery* guinea—the additional and *prohibited* guinea—was put into the ready hand of the Exchequer *Guinea-men*, in despite of the statute? This

is a question, the answer to which, but for form sake, needs no evidence. That of the *Solicitor*, of the *Board* which ever it was, under the orders of which the prosecution was, in each instance, ordered.

Two other questions.—The *Master Packer*, and the *Master Packer's Master*—the Deputy Remembrancer, and the Lord Chief Baron—were they respectively apprised of it?

At what *time* was it that this "abhorred" practice *did* sometimes take place—how many were these "*many years* "*since*" it was known to do so?

In whose Chief Baronship was it? In that of *Eyre*—in that of Skinner—in that of *Smyth?*—or in any part of the thirty years presidency of the old Attorney, knighted and made honest—as honest as to an English Judge it is possible to be—by the title of Sir Thomas Parker? Or was it at any time under the presidency of the *present* Lord Chief Baron, of whose services in that high station the country has had the benefit now for above these sixteen years:* if yes, whether it has been with *his* privity that any particular individual instance of this practice has taken place, and whether this has been among the means employed by him for the attainment of the object so effectually accomplished, and so solicitously defended?†

These are among the "*secrets*" which may perhaps present themselves as "worth knowing," whensoever *Mr. Whitbread*, refreshed by a summer recess, shall feel himself sufficiently refreshed to return to the charge; to return to the charge, and by one pull more—one pull, sufficient in *length* as well as strength, drag them completely and effectually out of the den of *Cacus*.

* Ever since 12th Feb. 1793.

† Turn to *Palmer on Costs*, pp. 175, 180. In a *Bill of Costs*, exhibited throughout in the character of a *real* Bill—not a *feigned* exemplification of a Bill—name of the cause, *The King against W. Scire facias* in the *Petty Bag* (Common Law side) in the Court of Chancery, may be seen a charge of 25*l*. 4*s*. This makes exactly the two guineas a-piece, stated as having been given to the Special Jury. Mr. *Law* (now *Lord Ellenborough*) is stated as having been one of the Counsel in the cause: the others being *Mr. Erskine* (now *Lord Erskine*) *Mr. Mingay*, and *Mr. Garrow*. Mr. *Law*, as being of the *Special Pleading* class, may be seen to have been more frequently consulted with than any of those other learned persons. This Bill of Costs having, for the purpose of taxation, passed of course under the review of the *Master* (the Master Packer) here we see a particular example of the open contempt put upon the Act above-mentioned, (24 Geo. 2. c. 18. § 2.) by which the giving or taking more than one guinea stands prohibited, as we have seen, in the most pointed terms. Of the individual instance of contempt thus accidentally laid open to view the date is in the year 1785.

To the Great Law Officer, on any future occasion should it ever happen to him to get up, and come out with a speech of a mixt nature such as the above, composed of part argument, and part evidence, *Mr. Whitbread*, or whosoever on any such occasion may occupy his place, will perceive, I am inclined to think, the use and propriety of decomposing such speech, and resolving it into those its component elements. As to the *argument* it need not give him much trouble: *that* may be left to answer itself. But the *evidence* is quite another thing: here he will see the use and necessity of that useful operation called *cross-examination*. I don't mean, that even upon the Great Law Officer himself, it should be performed in his *own* mode: of that it would surely be better to leave the monopoly in his own hands. I don't mean, that he should be called " *the greatest fool that ever* " *walked over earth*" with or " *without a Keeper*."* I don't mean, that he should be examined for no other *purpose* than to expose to contempt the *witness*, nor with any other *effect* than to expose to the same fate the *examiner* and the *Judge:* the examiner who *makes* such examinations, and the Judge who *suffers* them. What I mean is, that he should be examined—cross-examined—in whatever mode may happen to be best adapted to the getting out the truth:—which surely will be a very different mode.

* " *Attorney-General*.... First we have *Sir Richard Phillips*, who has given " us evidence of his being either one of the greatest fools that ever lived under " the sun, or that he is not to be credited on his oath. I say it appears from his " own testimony, either that he has given us false evidence, or that he is the " greatest fool that ever walked upon the face of the earth without a guide.

" *Lord Ellenborough* interposing.—Weakest, perhaps weakest.

" *Attorney-General*.—The weakest man that ever walked upon the face of the " earth without a keeper." *Carr against Hood and Sharpe. Cobbett's Register, Sept.* 17, 1808.

PART IV.

REMEDIES PROPOSED.

CHAP. I. Humble Proposal for restoring the Constitution in regard to Juries.

§ 1. *Introduction. Necessity of a Change in the System.*

IN the course of this inquiry, two dangerous diseases have necessarily and continually been brought to view:—a rottenness in one of the most important organs of the body politic, *viz.* Jury trial: 2. a sort of *weakness* about the *head*, having for its symptoms, on the part of *Judges* and other subordinate members of Government, a confirmed, habitual, and scarcely disguised contempt, as towards the authority of the Legislature.

The existence of the disease having, in both instances, been brought to view, next comes the more immediately beneficial task, but for which that unpleasant one would never have been undertaken, *viz.* the indication of the proper remedy.

In *this* chapter will be proposed, what presents itself as proper to be done, in regard to *Juries*.

That within the Sheriffwick of the Sheriffs of London and Middlesex, the institution of *Special* Juries, composed as at present, ought to be *abolished*—is supposed to have already been sufficiently demonstrated. If so, the consequence is—that within this district some different system will require to be set on foot. But, forasmuch as the establishing in one particular district, though it be the district of the metropolis, a system different from what is in use in the greater part of the kingdom, might, by infusing additional complication into a system of judicature already so over-loaded with complication, be productive of preponderate inconvenience; hence we are led to the consideration

of some plan which, being grounded on *principles* universally applicable, may *itself* be susceptible of an application equally universal without preponderant inconvenience.

The remedy here ventured to be proposed is stiled without scruple a *restorative:* a plan for the restoring, for the purpose of *Jury trial*, the original composition of Juries. Not that the plan is such in exact tenor and detail: for, if it *were*, it could not be such in principle and effect.*

All political institutions would be exposed to deterioration were it even by the mere change of circumstances: and if, where the change of circumstances is become material and extensive, the original constitution is left unchanged in detail, the consequence is—that, howsoever in words and outward shew it may be the same, it is become in substance and effect, in a proportionable degree, different. Nor yet would I have it thought, that in my vocabulary *old* is synonimous to *good*, or *better*, as in some vocabularies we have seen it, synonimous to *not so good* or *bad*. Be the state of things ever so good, to render them still better is, in my view of the matter, a *good* operation, not a *bad* one: the contrary opinion I leave to those in whose eyes the praise of letting off an old epigram is better worth than the consciousness of having rendered, or the endeavour to render, a public service.

Accordingly, in the endeavour to bring about a restoration of the Jury system in *principle*, I have not in detail neglected the opportunity of endeavouring to put it, for the future, into a state as much superior as possible to any state it ever was in before.

As to the existing *Special* Jury system, my real quarrel with it is—*not* that it is a *different* one from the original Jury system, but that, in comparison with it, it is a *bad* one.

* *Eight-pence*, for example, was the allowance given to a Juryman, as long ago as in the reign of *James the Ist*, (See Part I. Chap. 4. § 1.) and we know not for what length of time before. Give him eight-pence at this time of day, the allowance, besides being in *name* the same, may be a more or less proper one, but in *effect* so far from being the same, it is a very widely different one. And so, as often as *money* is concerned, and on whatsoever occasion, and for whatsoever purpose mentioned--take for example, *qualifications* for *Parliamentary Electors*.

§ 2. *Interests to be provided for;—Objects to be aimed at.*

For remedy to the disorders in question, before we enter upon the task of suggesting particular arrangements, it may be of use to have before us a distinct intimation of the several *interests* requiring to be provided for, and, for the purpose of such provision, of the several *objects* or *ends* requisite to be kept in view and aimed at—*viz.* in the framing of a plan for the composition of jurors, the selection of the jurors, and the compensation, if any, to be made to them, for their labour, loss of time, and expence.

The *interests* concerned are, in the first place those of the *suitors* or *parties* on both sides of the cause, in the next place those of the *jurors* themselves.

It is for the sake of the *interests* of the *parties* in each cause, or rather of such party or parties as are in the right, *viz.* in so far as he or they are in the right, that it becomes an object with the legislator, to make such provision as the nature of the case admits of, for securing on the part of *jurors* such degree of relative aptitude, in all points, *intellectual* as well as *moral*, as shall render the general tenor of their decisions as conformable as possible to the ends of justice.

Follows a brief intimation of these objects, ranged under three general heads—

I. *Objects referable to the head of* probity *or* moral *apti-*

1. Preserving Jurors as effectually as possible from exposure to the action of such sinister influence as is liable to be exercised by, or to emane from persons *in power;* and more particularly by or from the presiding and directing *Judge* or *Judges* as above.

2. Preserving them, as above, from such sinister influence in the shape of intimidation, corruption, or partiality, as is liable to be exercised by, or to emane from individuals or classes of men, in the character whether of parties or of persons having in any other way an interest in the event of each respective cause.

II. *Objects referable to the head of* intellectual *aptitude.*

3. In a judicatory so composed, providing *upon occasion* a degree of extra-aptitude, in respect of *intellectual* qualifications; *viz.* in consideration of, and in proportion to, any

degree of extra-*difficulty* attached to this or that particular cause.

4. —— or in consideration of, and in proportion to, any degree of *extra-importance.*

III. *Objects having respect to the interests of the* Jurors *themselves.*

5. Reducing to its *minimum* the quantity of *vexation* and *expence* attached to judicial service in this line.

6. Providing compensation for such portion of vexation and expence, as cannot be avoided without preponderant inconvenience: *viz.* without preponderant prejudice to the *main* object above-mentioned.

§ 3. *Arrangements proposed.* 1. *In Common Jury causes, mix Gentlemen with Yeomen.*

HERE follows a slight sketch of the Arrangements that present themselves as promising to be conducive to the attainment of the above objects: in case of *conflict*, regard being had all along to their respective degrees of importance, *absolute* and *comparative.*

1. The distinction between Common and Special Jurymen to be still preserved.—The *object* aimed at by this arrangement is—provision for *intellectual aptitude.*

2. In *ordinary* or *Common Jury cases*—*i. e.* in those cases in which at present the Jurors are all of them of the class of Common Jurymen—(say for distinction *Yeomen Jurymen*) let some one or two of the class of Special Jurymen, (say for distinction Gentlemen Jurymen,) be regularly inserted into each Jury.—*Object,* intellectual aptitude:—*viz.* under the expectation, that, for the benefit of justice, the influence of understanding upon understanding will exercise itself, of course, upon the *less-informed* class, by the instrumentality of the *better-informed.*

3. Number of Gentlemen Jurors not more than one or two.—The *interest* provided for by this restriction is that of *Jurors: object,* avoidance of unnecessary *vexation* and *expence: viz.* of vexation and expence, by reason of attendance; *viz.* on the part of an over-proportion of jurors of this class.

4. The district in which the Gentlemen Jurors are taken, let it be a district as remote as on other accounts will be consistent with convenience, from the district in which the Yeomen Jurymen are taken. *Object,* providing

for *moral* aptitude on the part of Yeomen Jurors, *viz.* by preserving them from being subjected to sinister influence —*viz.* to influence of *will* over *will*—whether in the shape of *intimidation*, or in the shape of *corruption*—emanating from Gentlemen Jurors. At the hands of the Gentlemen Jurors—of the men of superior education—the *salutary* species of influence—*viz.* the influence of *understanding* over *understanding*—of opinion on opinion—is looked for and desired. The use of the *distance* proposed, is—to serve as a bar to the exercise of *will* over *will*. To men of the Yeomen class—to shop-keepers, handicrafts, &c. living in the same neighbourhood with the Gentleman, it might frequently happen to view in his supposed disposition towards them a source of hope or fear. By distance this source of corruption would be cut off.*

§ 4. *Arrangements continued—2. Special Juries, half-and-half.*

POWER to any party, on either side, to cause to be substituted to the common jury composed as above, a *half and half* jury:† *viz.* a jury—not composed of *all* gentlemen, as in the case of the special jury constituted as at present—but containing any number of gentlemen not exceeding half: *viz.* out of *twelve*, *six*.

The *Interest* thus endeavoured to be served is, of course, that of the *suitors*.—The *Objects* endeavoured to be secured,

* The line of distinction being, in present as well as in all past times, so extensively as well as decidedly drawn—drawn in *name* as well as in correspondent *practice*—no objection can surely be raised against it, on any such ground as that of a tendency to keep alive and foment invidious distinctions. In these our *Fortunate Islands*, the *Yeoman* of *to-day* being the future contingent *Gentleman* of *to-morrow*, no such heart-burnings have place between them, as in those countries in which a vast and unvarying gulph has place betwixt the two classes.

† *Half and half.*] *De medietate status* is the learned denomination, but for my part I prefer this English one: and this although it be, or rather because it is, so vulgar an one. In every part of the field of law, the interest and thence necessarily the endeavour of all lawyers, has been to render the rule of action not only as *uncognoscible* but as *unintelligible* as possible. Of every friend to mankind the endeavour, it scarce need be said, will be the reverse. As to the science of jurisprudence, and the art of legislation, for teaching and learning these accomplishments the aid of this foreign and extinct language may here and there perhaps be necessary: and necessity, so far as it exists *may*, but nothing short of necessity ever can, justify any such use of it.

As to the epithet *half-and-half*, among *publicans* at least, it would be difficult, I imagine, to find a man to whose ear it were not familiar:—and therefore probably among the greater part of their guests.

are, in the first place, by the enlargement of the number of the gentlemen jurors, *intellectual* aptitude: *viz.* by adding to the chance of finding a juryman qualified in an extra degree for taking the lead, and guiding the decision: in the next place by the *restriction* put upon the number of the jurymen of that class, *moral* aptitude: *viz.* by preventing the preponderance of partiality as between rank and rank.

Of the sort of mixture here proposed, the importance is such as seems to claim a particular degree of developement. In every species of judicatory without exception, but in a more pre-eminent degree in every judicatory of which a *jury* forms a part, of all imaginable causes of misdecision what is commonly understood by the term *partiality* is that which the legislator finds greatest difficulty in coping with. Wheresoever the nature of the influence—the sinister influence—supposes *two* parties—one acting, the other acted on—his task is comparatively an easy one. All that in *that* case he has to do, is—to keep them from coming together: and, with a moderate degree of probity, exertion, and intelligence, how easy *that* is may have been seen already.

But the case of *partiality* supposes not any such parties: it supposes not any tempter from without. The tempter dwells *within:* within the very bosom of this occasional Judge: and, being there, in vain would legislators dislodge him, he bids defiance to their utmost efforts.

Religion or *politics*—if, by the nature of the case, any such cause of dissention happens to be called forth—called forth in such manner as to excite, in the bosoms of any of the jurors, sentiments—whether of sympathy or antipathy—in relation to the parties on each or either side—against this source of *partial* affection—of *corrupt* affection, (as, even though there be no corruptor, it may be stiled) against this source of *misdecision*, all that in the station of the legislator can be done by human wisdom is here without avail: in *this* shape, *corruption* may have established in a man's bosom ever so complete an empire, *there* it must reign, and reign uncontrouled: you can never punish it, for you can never prove it.

Among jurymen, a possible, and not unnatural, source of *partiality*, on either or both sides of a cause, and thence of *dissention*, is that of which difference of rank and station in life is the instrument.

With partiality and dissention in this shape, the proposed *half-and-half* jury, as well as any other jury, stands exposed

to be infected: and indeed by the nature of its constitution and composition, may appear, and not altogether without reason, to be exposed to that accident in a particular degree. But while it contains in itself the seeds of the disease, it furnishes at the same time a remedy:—a remedy—such an one as cannot in any other mode be supplied.

Take, for example, a case, such as, in the country at least where there is no Guinea corps, is frequently exemplified—a *special* jury, with a deficiency in it made up by Yeomen: by *common* jurymen, in the character of *talesmen*. Suppose, as between a Gentleman and a Yeoman, a cause so circumstanced as to awake, in the bosoms of these different parts of the population of the jury-box—to awaken, and to excite, to a degree of excitation fatal to justice, the passions and partialities congenial to their respective stations. In this case, let there be *seven gentlemen* to *five yeomen*, the gentleman carries it. But, suppose *six* and *six*, as under the proposed constitution will constantly be the case, in this case partiality may reign without opposition in eleven bosoms, so as one of the twelve, even though it be but one, be the seat of cool and impartial justice, he who has *right* on his side, be he gentleman or yeoman, gains the cause.

Of the proposed provision, by which the number of Gentlemen Jurymen even on a Special Jury is limited to *half* the whole number, *viz.* to *six* out of the *twelve*, the expected use is as follows:—In ordinary cases, for the purpose of guidance, by means of intellectual aptitude, one or at most two, was, as above (§ 3.) regarded as sufficient. For this same purpose, the additional chance, afforded by the substitution of *six* to *two* or *one*, may, it is supposed, be regarded as amply sufficient, even in any the most extraordinary cases.

As to the case of a contention between opposite *classical* partialities, a case of this sort, it is hoped and supposed, will, comparatively speaking, be a rare one. But, that it should now and then find itself exemplified is no more than what ought to be expected, and provided against accordingly.

Here then comes in an occasion, for applying to this case that beautiful feature of jury-trial, which, by the use thus proposed to be made of it, can scarcely fail to have been already presented to the reader's notice: that no less politic than generous arrangement, contrived by the genius of some now forgotten statesman, for the protection of

foreigners against those adverse interests and antipathies, which are so unhappily apt to have place in the bosoms of *natives*.

A mind in which virtue in both her forms, moral and intellectual, shines thus bright, can hardly have been that of a lawyer. In matters of foreign politics—of political economy—in every branch of knowledge not immediately conducive to the advancement of their own personal or professional interests, the breasts of lawyers, especially in the "*highest situations*," are even in these comparatively enlightened times, among the most noted tabernacles of *ignorance*; of ignorance, and of that *error* which, when accompanied with the degree of presumption so natural to such situations, is so much worse and more mischievous than simple ignorance.

When, for the benefit of foreigners the *half-and-half* jury was introduced, it was not confined to the cases called *civil* cases: nor among cases called *criminal*, to those of inferior importance: it covered the whole field of jury trial.

As to special jury trial, slid in by lawyers for the advancement of their own interests, and accordingly as it were by stealth, introduced by them, as we have seen, in pursuit of those two grand sinister objects, increase of *power* and *profit* to themselves, they neither dared nor cared to give it any such all-comprehensive range.

But, if needful for causes of property, and in the case of offences comparatively trivial, how much more needful must it not be in causes which, to the individuals at least whose station is on the defendant's side, are of the very highest importance, causes of life and death?

A principle which, in expectation of the superiority of intelligence expected from superiority of rank, gives up the reins without controul, to every *prejudice* and every *partiality*, with which it can happen to that intellectual superiority to be accompanied, is rotten at the core.

Argument against and for a half-and-half jury as a substitute to the existing special jury.—Dialogue between a Gentleman and a Yeoman.

Gentleman.—We are in *possession* of having a jury of our own sort at pleasure: that possession we claim to have preserved to us.

Yeoman.—More shame for you. On no principle, either of natural justice, or of the English constitution, can you defend this so recently usurped advantage.

As to us, so moderate is our claim, that with that equality of *numbers*, which is all we ask for, the advantage, in any contest between you and us, would still be most decidedly on your side.

On *your* side is the superiority of intellectual force in all its shapes:—*knowledge*, *address*, habit of *taking the lead*.

On *your* side is the whole force of that *influence* which exerts itself on the *understanding*. On your side is every element of what is called *respectability: education*, *opulence*, *power*, *rank*, *connection*. On no *other* occasion does this your superiority ever find you backward in the assertion of it: asserting it on every *other* occasion, and to every *other purpose*, on *this* occasion alone, to *this purpose* alone, you will not surely take upon you to deny it.

On your side is the whole force of that still more irresistible *influence*, which by *will* is exerted over *will*. To your class our's looks up—looks up with hope—for *employ*, *custom*, *protection*, every thing: your's to our's, for nothing. From your class, our's has every thing to *fear*; your's from our's, nothing. Without any the slightest ground, or so much as a pretence, a man of your class has but to *bring an action* against one of our's, or if an action be not oppressive enough, to *file a bill* against him, his ruin follows of course. This is what we are indebted for, both of us, to *your* good friends, the lawyers. I say *your's*: for your's they *are* as against us; and your's they would be, if they were any body's.

But, to come to the point at once. Can you seriously *think*, and seriously take upon you to *say*, that, in case of difference, six of us can, in general, have as good a chance of persuading six of *you*, as six of you of persuading six of *us?*

What we not merely consent to, but propose and desire is—that in ordinary cases—in all cases but those in which this proposed equality of numbers happens to be insisted on, there should be some *two* or *one* at least of you, for our guidance:—so far is this claim on our part from having for its principle any sentiment of hostility towards you;—any sentiment inconsistent with cordiality, respect, and deference. As to confidence, unbounded confidence, it is more than human nature can ever, in the instance of any individual, much more in any large class of individuals, lay claim to, with any colour of reason or justice: and with

political liberty, in any shape or degree whatsoever, it is utterly incompatible.

§ 5. 3. *Arrangements continued—Compensation-Money to Jurymen.*

1. In the allowance to jurymen distinguish two parts: one for *demurrage, viz.* at the place of trial; the other for *journeys, viz.* thither and back: *demurrage-money* the same to all: *journey-money* proportioned to the distance between the place of trial, and each juryman's place of *residence*, and rated at so much a mile.

2. To save calculation, and prevent disputes, after taking, in each parish, a particular spot—say the site of the parish *church*—for the mark, let the distances of the several parishes from the place of trial be previously ascertained, once for all, and, in the form of a *Table*, written or printed, kept hung up in the Court; and also in the *Office*, in which payment is made to the jurymen.

3. For *demurrage*, let the allowance to each juryman be so much a day for the whole time of his necessary stay: and without regard to the *number of causes* in which it may have happened to him to serve: the amount being *pre-appointed, viz.* by a general regulation, having for its object the fixing it at whatever sum is regarded as being *at that time* and place necessary and sufficient for the maintenance of a juryman of the Yeomen class; which fixation may consequently, in respect of the change in the value of money, require amendment from time to time.*

* Where the length either of journeys or of demurrage is any thing considerable, paying a juryman *by the cause* neither could *then* be, nor ever can be, any thing better than a very unequal plan of payment. For since it would commonly, if not always, happen, that the *same juryman* would have to serve in *divers causes*, therefore when, in the instance of any such occasional Judge, the number of causes in which he served happened to be *above* the calculation, (*viz.* the calculated number, in the expectation of which the fixation of the sum in question took its rise) he might be to a considerable amount a *gainer*: when *below* that mark, to a considerable amount a *loser*. Here then was a sort of *lottery*: but in respect of the ballance in point of comfort, all such lotteries are disadvantageous upon the whole.

Be this as it may, till at a comparatively late period, the circumstances of the times admitted of no other. It was not till the reign of Henry the 8th, *viz.* by statute 22 Hen. 8. c. 5. that for raising supplies for public purposes, any such rates as the *County* rates appear to have been in use. If so, the purse of one or

4. Let the allowance be neither more nor less to Gentlemen than to Yeomen Jurymen.

For, if to the Gentleman the expence of attendance will naturally be greater than to the Yeoman, it is because in general the Gentleman, in respect of his superior opulence, is better able to afford it.

True it is, that the rank of the *Gentleman* is not exempt from *indigence:* understand *casual* and *relative indigence.* But neither is that of the *Yeoman:* and surely it is in the *worst-provided* class that the degree of indigence, and consequent suffering, is capable of being *most acute.**

other party was therefore the only fund on which the expence could before that time be imposed.

The year 1623 is the earliest point of time to which, on this subject, the information left to us extends. At *that* time, as already observed, (Part I. Chap. IV. § 1. p. 27.) *eightpence* a head *per cause* was the allowance made to jurymen. And it was no greater in the Country, at the *Assizes*, where a juror might have 30 or 40 miles to travel, than in the metropolis, at *Nisi Prius* or at *Bar*, where he could not have more than a mile or two.

In those days eightpence was in *real* value as much perhaps as between three and four shillings now. But we know not at what earlier point of time this sum may have been fixt: nor consequently how much greater than at present the real value of it may *then* have been and been designed to be.

Be this as it may, paying them by the *cause* must, at that time as at all times, have been, as already observed, an ineligible mode of payment: the amount of the allowance being to *each* person uncertain, and therefore in point of *general* comfort, the arrangement a disadvantageous one upon the whole.

* If human reason had been in use to apply itself to the subject of *judicial procedure* in general, and to *jury trial*, considered as a part of it, in particular, the multitude of persons subjected to vexation in this shape, would never have been, for *all* causes without distinction, fixed at so large a number as *twelve*. But this is among the subjects to which as yet human reason has *not* been in use to apply itself: among non-lawyers scarce any person, in point of intellectual acquirements, competent, in any degree, to the task, having found and felt in his bosom a *particular* interest, strong enough to call forth the application of them to the subject: and as to lawyers, acting all along under the impulse of a professional interest opposite in almost every point to that of the public in general, the disposition to endure inconveniences in all shapes without remedy, not the disposition to be on the look-out for remedies, is the disposition which, on all causes, it has been their study to keep up, and inculcate.

But (to put an impossible supposition) had any interests other than those of the all-powerful framers of the system, viz. the *Judges*, with their associates and dependents, the professional and other official lawyers—had in a word the interests of the people, either in the character of *suitors*, or in the character of *jurymen*, presided over the details of it, the reduction would not have stopped there; but, having regard to the whole of this mass of vexation together, would have confined the production of it to the case in which, in the judgment of one or other of the parties interested, it would be of use: in a word, every

§ 6. *Arrangements continued—4. Fund, on which the Compensation-Money shall be charged.*

1. As well in ordinary or *common jury* causes, (*viz.* where, by the supposition, no more than one or two Gentlemen are upon the jury) as in extraordinary or *special jury* causes, where (also by the supposition) as many Gentlemen as Yeomen are upon the jury, let the expence of the above proposed compensation-money (say *jury-money*) be borne—not by the suitor on either side, but by the public at large: —*viz.* by being added to the *County-rates*:—unless, for this particular purpose alone it were worth while to look out for a mode of assessment more equable.

The *interest* here provided for is that of the *suitors*: *viz.* on that side of the cause on which, whether in the right or the wrong, this part of the costs of suit would otherwise be imposed.*

2. In a special jury cause, *i. e.* where, at the requisition of a party on either side, a half and half jury has been ordered, to prevent a disproportionate quantity of *vexation* in this shape from falling on the Gentlemen's class, let an extra sum of money, at the rate of so much a head for the *extra* number of jurors allowed (*viz.* four or *five*) be charged in the way of *costs*, on the party by whom the requisition was

cause, not of a penal nature, would, in the first instance, have been determined in the mode so strongly insisted on in another place: (See Scotch Reform Let. I.) *viz.* in the way of *natural* procedure, in a single-seated judicatory, as now before a Justice of the Peace; *jury trial* not being resorted to but in the way of *appeal*.

* From the aggregate number of lawsuits which receive their decision in the course of a given length of time, the aggregate body of *non-litigants*, in proportion as those decisions are, or are supposed to be, conformable to justice, derive *gratis* that security, which the aggregate body of *litigants* in those same suits do not enjoy but at the charge of the aggregate mass of vexation and expence attached to those several suits. (See *Protest against Law Taxes.*)

On this principle, so far as *bonâ fide* litigants alone are concerned—on this, were this the only principle consulted, there is not any part of the expence of litigation that ought not to be shifted off from the purses of litigants upon the public purse. But, if this transferrence were extended to the *whole*, litigation would be converted into a game: in which the expence of the stakes, being borne by the public, would thus be raised to an *infinite* quantity: raised, *viz.* for the amusement of litigants and profit of lawyers. Where however the expence assessed on the public is incapable of being increased, in so far as this is the case, the mischief in question cannot by the transferrence in question be increased. And in this case is the allowance *here proposed* to be made, as well as that part of the emoluments of Judges which is in the shape of salary.

made: payable, however—*not* to the Gentlemen jurymen, but to the *County* or other public Fund on which, as above, the ordinary expence of *jury-money* is proposed to be charged.

Interest provided for, that of *jurymen: viz.* Gentlemen jurymen:—*object* aimed at—prevention of vexation—*viz.* of vexation which, in the shape of jury-service, might otherwise fall in an undue proportion on that class.

3. Immediately after the trial, upon the bringing in of the Verdict, let the Judge, instead of leaving the expence of the extra jury-money to lie, as above, upon the party by whom the *half-and-half* jury was required, have power either to impose it on any other party, or simply to take it off: in which latter case the contribution destined, as above, for the public fund will for this time not be received.

4. In the event of his exercising, in either way, the above proposed power, it ought to be under the notion, and naturally will be, that the cause is of the number of those which, on some *special ground* or other, will warrant the imposing on the *Gentlemen's* class this addition to the quantity of vexation imposed upon them in this shape. This *special ground* will, as above, be either 1. *extra difficulty*, 2. *extra importance*, or 3. demand for equality of numbers on the score of *apprehended partialities*, say more briefly *apprehended partialities*. In the terms of his *order*, let the Judge specify on which of these several grounds it has been founded.

5. For a further check upon the practice of making wanton demands on the time of the *Gentlemen's* class, lest the simple charge of the *extra jury-money* (which at the present established rate will amount to no more than either four or five guineas) should not be sufficient, let the Judge have moreover power to increase it at his discretion, up to a limited amount: suppose, for example, *treble* the amount of the simple charge.

6. The form of the Judge's order may, in any of the above cases, be extremely simple:—as for example—1. *This cause being by me deemed proper for the cognizance of a special jury, viz.* on the score of [then proceed to say *extra difficulty*, *extra importance*, or *apprehended partialities*, any *one* or any *two*, or all *three*, as the case may be] *let no extra jury-money be paid*—or *let extra jury-money be paid—not by* ——— *being the party by whom the requisition of the special jury was made, but by* ——— [mentioning some other party or parties.] 2. *The requi-*

sition made of a special jury in this cause by ——— [here mention the name of the party, and his station in the cause] *being by me deemed groundless and wantonly made, instead of* ——— *being the simple amount of the extra jury-money, payable to and in exoneration of the County fund, let the sum paid by him be* ——— [here mention the sum.]

7. Let fines for non-attendance be paid to and in exoneration of the fund on which the expence of jury-money is imposed.

For further explanation and justification of the above proposed arrangements, a few more words may perhaps not be ill bestowed.

As in the case of the *Yeomen's* class, so in the case of the *Gentlemen's* class, justice requires that as in any *other* shape, so in the shape *in question*, a disproportionate quantity of *vexation* shall not be imposed: thence the ground for the preventive measures above proposed.

But, rather than any extra pecuniary allowance, in the name of *compensation-money*, should be given to individuals of the Gentlemen's class in contradistinction to, and at the expence of, those of the *Yeomen's* class, better the money were thrown into the sea. By any such extra allowance, a pernicious principle—a principle of sordid and oppressive partiality—would be perpetuated: and public service in this shape, would, instead of being a burthen indeed, but an honourable and useful, nor *that* a heavy burthen—imposed on all alike, would as at present be an object of rapacity and intrigue, sought for and obtained by such as are least deserving of it.

If, upon this plan, *vexation*, in the shape in question, should, in a proportion a little greater, (and it could be but a little greater) fall on the *Gentlemen's* class than on the *Yeomen's*, the overplus would, it is supposed, find for its justification the following grounds, none of which could have any application in the opposite case.

1. In the character of suitors, to the lot of the Gentlemen's class fall, in by far the larger proportion, as well causes that are attended with *extra difficulty* as those which are attended with *extra importance*.

2. When, on the only remaining ground, *viz.* the ground of *apprehended partialities*, a *special* jury is allowed, (*i. e.* a jury containing an extra proportion of *Gentlemen*) it is, principally if not solely, for the protection of the interests of

this class, in case of any conflict which it may have, with the interests, passions, or prejudices of the other. Receiving this *extra benefit*, they ought not to grudge a small portion of *extra burthen*.

3. Between the Gentlemen's class and the Yeomen's, the characteristic difference is—that, of the Gentleman's time a portion may be applied to this *public* purpose—to the purpose of judicature, without imposing upon him a loss of a *pecuniary* nature: whereas in the case of the Yeoman a tax upon his *time* is, besides the tax upon his *time*, a tax upon his purse.

4. Service in this line being a source of useful information, and, like a scholastic exercise, a source of intellectual power, whether it be or be not pleasant to the particular individual, it is for the advantage of the public at large that each man should have his share of it: and if this be true even in the instance of the Yeomen's class, whose share in other branches of Government is comparatively so small, it must be so in a more eminent degree in the instance of the Gentlemen's class, whose share in other branches of Government is comparatively so large.

By service, in the department of *justice* in the character of *juryman*, a man is, in some measure, trained and fitted for service in the field of Government at large, in the character of *parliamentary Elector*.

5. It may be of use that it should be distinctly seen on what ground stands the demand for an extra number of Gentlemen jurymen on the score of extra difficulty or extra importance—in a word, on any other ground than that of apprehended partialities to the prejudice of that same class. For the purpose of guidance, if by no other than the only useful and proper sort of influence, *viz.* influence of understanding over understanding, *one* man of superior intellectual aptitude is as sufficient as any greater number could be: to this purpose therefore the only advantage gained by any addition to the number of Gentlemen in the jury, is the additional *chance* it affords of obtaining the requisite degree of aptitude in this shape, in the person of some *one*.

In regard to the *fines for non-attendance*, the present system being inefficient, and almost completely nugatory, to give effect to them, and reconcile at the same time to each other the antagonizing ends of justice, would require some new arrangements which, if intentions were

but honest, might easily enough be carried into effect. On this head, a few general hints are as much as room can be found for in this place.

1. The interest that individuals at large have in the *general fund*—say the *County Fund*—not affording to any one of them a motive adequate to the purpose of engaging him to watch over its interest in this behalf with effect, a special interest must be given to some one person—for example, the person by whom the monies of this fund are received: a special interest, *viz.* in the form of a per centage upon the amount.

2. Into the pocket of this one person the money ought to be made to find its way as it were of course: *viz.* without need of a *law suit* to be instituted by *him*, much less by any one else, for that purpose.

3. On non-appearance of any person summoned to appear for the purpose of jury service, let the money be, by a certain day thereafter, levied on him of course: unless at the day, appointed for appearance, in lieu of the person himself, there appear, under his signature, a paper exhibiting some one or more of a list of legitimate excuses, to be allowed and mentioned as such in the form of the *summons:* the facts of such excuses to be established by an affidavit, with or without co-attestators as the case may be, according to *printed* forms, *pre-appointed* for the purpose, free of stamp-duty, and every other avoidable expence.

Were the arrangements left to *him*, a member of the *firm* of *Judge and Co.* would settle them on this occasion as he does on others. From this burthen as from others, applications made for relief in the case where by accident, as above, the burthen has been rendered *undue*, would be more burthensome than the burthen itself: of an application thus made, the *burthen* would be *certain*, *success precarious*. Defaulters without excuse would remain unpunished: defaulters with good excuse—defaulters from necessity—would be oppressed. To each useful purpose the system would be inefficient: suffering to particular individuals, with pickings to Judge and Co. out of the same, would be the only fruit of it.

At the same time the whole business would be conducted with the most unimpeachable regularity. Precedent would have been pursued in every thing that was done: and thus, as usual, all complaining mouths would be shut:—unlearned

mouths shut, learned shoulders saved harmless; saved, from every particle of *burthen*, as in all other shapes, so in the shape of *blame*.

§ 7. *Arrangements continued—5. Formation of the qualified List—viz. in other Counties, &c. as well as Middlesex.*

THE basis of the jury system being the *qualified list*, the plan here brought to view might appear chargeable with oversight or negligence, if a topic so material were altogether passed by in silence. But the relevant facts being in so high a degree diversified, and for the most part so inextricably buried in obscurity, the nature of the case precludes every such attempt as that of proposing, in relation to this part of the subject, particularly in such a place as the present, any thing like a *detailed*, *determinate*, and in a *geographical* sense all-comprehensive, system of arrangements.

By change, be it what it may, by innovation, on this as on every other part of the field of law, inconvenience, in some shape or other, in some degree or other, is sure to be produced. Unless therefore and until, inconvenience in some specific shape, can be pointed out as resulting, or about to result, from the arrangements actually in use, this general consideration, loose as it is, will, in each division of the country, as well as at every period of time, operate as a sufficient bar against any change that can be proposed. But no sooner is any such specific inconvenience pointed out, than the bar is provisionally removed: and then comes the operation of making a comparative estimate of the amount of inconvenience on *both* sides, in such sort that when placed by the mind in two opposite scales as in a ballance, a just conclusion may be formed, determining on which side the preponderance has place.

But, in different territorial divisions, counties, and privileged boroughs taken together, circumstances are, in this respect, so extremely different, that, independently of those changes, which, in some or all of them, are liable to be brought about by *time*, it can scarcely happen but that, if the same course be, in all of them, pursued without variation, inconvenience, and to no inconsiderable amount,

would, upon enquiry, be found, in some instances, to have place.

Hence it is that, upon *a general* view of the subject, and antecedently to such *particular* enquiry, as no power other than that of Parliament is competent to make with effect, a general enquiry, of the nature above-intimated, cannot with propriety be considered as superfluous.

For any such enquiry, the present however is not the proper place. The alarming political grievance, the utter destruction impending over the palladium of the English constitution, the liberty of the press—this was the consideration, but for which the present enquiry would never have been engaged in. Of this mischief the County of Middlesex has, by the causes already spoken of, been rendered almost the sole theatre. To the exclusion of these mischiefs, so far as depends upon the composition of the *qualified* list, an assemblage formed upon the principles upon which the composition of that list has hitherto been grounded, may, for any thing that hath as yet presented itself to my view, be sufficient: I mean of course with the help of such ulterior arrangements as may be conformable to the principles herein already brought to view.

On what persons ought the *obligation* of serving on juries to be imposed? Answer—On every human being, but for some apparent and special cause, either of *exclusion* or *exemption*. It is therefore by the indication of such *causes*, with the *reasons* on which their aptitude in that character respectively depends, that the proper abstract answer to that question will, in its several ramifications, be furnished. So far as concerns *exclusion*, these causes would be found to bear a considerable analogy to the causes of exclusion applicable to the function of *parliamentary elector*. In some instances a cause that applies to the one function, would be found exactly applicable to the other: while in other instances such coincidence will be seen not to have place. But in the instance of every circumstance that, in the character of a cause of exclusion, can be proposed with reference to *either* function, whether it be deemed applicable to *both* functions or to *one* only, and whichsoever be that one, considerable light would be seen to be thrown on the subject by the comparison thus proposed.

Thus much may be said of both cases: *viz.* that, consideration had of the great change in the value of money, as

well as in other influencing circumstances, in abundance, if the existing arrangements were proper at the times at which they were respectively made, it is impossible that, taken all together, they should be equally so at present.

At the same time, from the mere existence of that comparative degree of impropriety, it follows not, that the advantages capable of being gained by the removal of the impropriety, would be an over-balance for the inconvenience that ought to be apprehended from a change.

A state of things by no means incapable of being realized, and which ought therefore to be kept in view, is—that, the arrangements, having been in a less degree proper at the time when they were made, have by change of circumstances been rendered more proper than at first:—that, for example, the pecuniary part of the qualification, having originally been set at too high a rate, has, by the depreciation of money, been rendered more proper in the present less immature state of society, than it was in the more immature state of things which gave birth to it.

For any attempt to penetrate any further into the subject, it would be time enough if, for any practical purpose, the observations herein already submitted to the public should be found to have a claim to notice. Taking the County of *Middlesex* in the first place for the local field, it would *then* be time enough to extend the enquiry to the formation of the several *original qualified* lists for the several species of juries, relation being likewise had to the several species of judicatories in which they have to serve.

It would then also be time enough to extend and apply the whole of the enquiry to the several other *Counties*, and judicial districts *included* in Counties.

Should any such enquiry come to be instituted, the facts, collected and brought to light in relation to the County of *Middlesex*, by the public spirit, the activity, and intelligence of Sir Richard Phillips, *(See his above-mentioned Work throughout)* will be found highly serviceable: for out of them may be formed a basis for enquiry, applicable to the several other cases just alluded to. As to all these matters, for the present at least, I can therefore do neither more nor better than to refer the reader to that eminently valuable and meritorious publication.*

* On the subject of what is called *unanimity*, my opinions have, in this very work, been already too plainly and strongly expressed to need repetition here.

§ 8. *Arrangements continued—6. Corruption by Individuals how prevented—No Party should foreknow his Jurymen.*

As well in special jury causes, *viz.* with a *half-and-half* jury, as in common jury causes, with one or two Gentlemen jurymen, let matters be so ordered, that, to the parties on each side, it shall, to the latest moment, be impossible to know, who the persons are that will serve as jurymen in the cause.

The *interest* thus provided for, is that of the suitors, *viz.* in each cause that of him who is in the right: the object aimed at is—on the part of jurymen, *moral aptitude: viz.* in respect of exemption from such corruptive influence—such influence of will over will—as it may lie in the way of individuals in the character of suitors, to exercise on the decision of those their occasional Judges.

On this occasion, before we come to speak of the *means* conducive to this end, observation will require to be taken of a sort of conflict which has place between *interest* and *interest*, and thence between *object* and *object:* between the interest of *suitors*, (*viz.* such as are on the right side as above) and the interest of *jurymen.* If that of jurymen were the interest that possessed the sole or the predominant claim to regard, *rotation* and that alone would be the principle employed: for, as will be seen, in so far as that principle is departed from, in so far on the part of jurymen *vexation*—the aggregate mass of vexation, produced by the obligation of serving in that character, must, *viz.* in respect of the number of them subjected to it, be increased.

But in that case, of the jurors who will have to serve in a given cause, if no supernumeraries are summoned, the whole number, or if to make allowance for accidents supernumeraries are summoned, (but in no greater number

But, the mention here made of so important a topic having been but *incidental,* I have not included it *in form* in the list of the changes *here* proposed. The subject being as yet far from exhausted, to do complete justice would require, as by its importance it would well warrant, a separate publication.

In any leading quarter, during the short time that I can have yet to live, should a disposition ever manifest itself to consider the dictates of *veracity* and *justice* as fitter guides for the conduct of English judicature than blind and unreflecting prejudice, it will then be soon enough to bestow upon the subject a quantity of *time* and *space* proportioned to its importance. It might then be seen, perhaps, nearly to what *age,* and not improbably to what *parents,* the monster owed its birth.

than is necessary to make sufficient allowance for such accidents,) a large proportion of that number, might come to be foreknown to the suitors in that same cause. Here then is a door open to corruption—to corruption in that shape—or at least in one of those shapes—in which the existence of it—the notorious and declared existence of it—gave birth to the first of the whole string of those statutes relative to juries, in which any mention is made of *special* juries.

If the principle of *rotation* be taken for the basis, two other principles ought therefore to be mixed with it: mixed with it, in the character of *correctives* and *preservatives: correctives, viz.* to the tendency of that principle, when employed crude and single, *preservatives, viz.* against the danger of such sinister influence. The one is—the principle of *disconnection* as above explained; disconnection as between Gentlemen jurymen and Yeomen jurymen, by means of *local distance.* The other is—the principle of *chance: viz.* as applied to the determination of the individuals that shall serve together on the occasion of each several cause.

But, when applied on the occasion in question to the purpose in question, the principle of *chance* requires an increase of number—of the number of persons subjected to this vexation: it requires, for the purpose of each several cause, the attendance of a number greater than the number of those who will have to *serve* on the occasion of that same cause: for, if *twelve* (the number of those that serve on each cause) were all that, under and in virtue of the summonses delivered to them by the sheriff, were capable of serving in that cause, the consequence is, that of each man, in so far as it were certain that he would *attend,* it would be certain that he would *serve:* and in this *certainty* there would be no room for *chance.* True it is that of his attendance even in that case there could be no *absolute* certainty: for, besides the accidents, such as death and sickness, to which all mankind are subject, and over which the will of man has no controul, if, relation being made to the state of the law on one hand, and the state of his own affairs and inclinations on the other, it were to this or that man more agreeable to stay away in despite of the law, than attend in obedience to the law, he would do—as jurymen, or at least as Gentlemen Jurymen are at present suffered to do by Gentlemen Judges—he would stay away accordingly. But, though, to any *good* purpose, certainty would not in

that case be attainable, yet to a *bad* purpose, *viz.* to the purpose of corruption, in the way in question, a *probability* but too little short of certainty *would* be attainable: for the corruptor, foreknowing—knowing as soon as the list of the persons summoned, or about to be summoned, for service in the cause in question, were known to him—the corruptor knowing of twelve persons, in the power of every one of whom it would be, bating accidents, to serve, would at the same time know of so many persons, of the attendance of any one or more of whom he would, in the event of his succeeding in his plan of corruption in their instance, be sufficiently assured.

In the case of common juries, the statute so often spoken of (3 Geo. 2. c. 25.) has, in § 8, with or without intending it, afforded for this salutary application of the principle of *chance*, a sufficient basis: 72 being the greatest number, 48 the least number which (regard being apparently had to the difference between County and County in respect to *local extent*) it allows to be summoned to appear, on each occasion, for example, at each *Assize*, for the trial of whatever number of causes may happen to be ready for trial at that Assize. But not only of this least allowed number 48, but of a considerably less number it is evident, that, with the help of the principle of chance, it might be made use of, in such manner as to render corruption—previous intercourse, and thence corruption—on the part of individuals, practically speaking impossible. For the first cause that comes on for trial, immediately before the trial, let the names of all such as are present be put into a dark box, shaken together, and so drawn out. If of these twelve it were determined that after this first cause they required respite, (though for the Judge who has the guidance of them there is no respite) these might on the second cause be all of them set aside, and for that second cause the lottery be confined to the remainder: and, the first twelve being after their respite replaced in the lottery, so on through any number of causes.

But if in the instance of any one cause, it be in the power of any one person of himself to *determine*, or by any other means to *know of*, a set of persons, in the power of each or even any one of whom it shall be in the character of juryman to serve, in the power of that one person it is, whether by neglect or by design, to *introduce* an intended corruptor to so many persons in whose power it will be, if

corrupted, to secure to him the verdict he desires: and, the greater the number of the persons to whom it happens to be in possession of this knowledge, the greater the number of such possible *introductors*, and by that means the greater the probability that such corruption will take place.

Let for instance the rule be such, that it is by a certain person, for example *the Sheriff*, (that is to say the *Attorney*, by whom, in the character of *Under Sheriff*, the business is done)—that it is by this person that the list of the persons, who are to be summoned to serve as jurors on the occasion in question, for example on the *Assize* in question, are to be determined;—that at the Assize in question, the number of these is to be 48;—and that in the first cause that stands on the roll the twelve first of those that appear are to serve. In this state of things it is evident, that, if to this Attorney it should happen to find his convenience, either in corrupting the requisite number of jurymen himself, (which might be attended with some danger) or in letting in another corruptor upon them (which might be done without any danger) the *regular* practice will find itself altogether well adapted to the purpose.

In this state of things, thus for illustration sake supposed, we see, in aid of the practice of corruption, two auxiliary principles—*viz. choice* and *foreknowledge*, confederated. But even without the aid of *choice*, *foreknowledge* may very well be sufficient for the purpose. Suppose it settled, that in the *gross* or *total qualified list*, the names shall be entered in the order of the *alphabet*: moreover, supposing the whole number in a given County 480, and 48 the number to serve on each Assize, that for the first Assize the 48 whose names stand first in the alphabetical list thus composed shall be summoned to attend; for the next Assize, the next 48; and so on. On this plan, if pursued without deviation, it will *not* be in the power of the Sheriff (that is of the *Attorney* his *Deputy*) to *choose* a set of eventual jurymen for the purpose of their being corrupted; but, what is worse, it *will* be in the power of every litigant to whom the order of things in question is known to find his way to those on whom he proposes to himself to make the experiment—to find his way to them *of himself*, and without the need of being beholden for introduction to an Under Sheriff or any body else.

Thus much as to juries *in general*—thus much as to *common* juries: thus much as to what, in that case, is *capable* of

having place! As to what in that case *actually has* place it is what it might take up too much room to state, and what at this moment the means of enquiring into are not within my reach.

As to the case of *special* juries, what actually has place lies in a narrower compass, and at the same time within reach. In this case every thing that, for the furtherance of corruption, by possibility *could* have been done, *has* been done: whether it be *constant* corruption, administered, and with *certainty of success*, by and for the benefit of persons in "*high situations*" as such, and without either *risk* or *trouble* on their part, as above—or *occasional* and casual corruption, to be on this or that occasion, administered, in his *private* and *separate* account, by this or that particular person, in or out of *high situation*, to whom it may happen to stand in need of such assistance. In the first place *choice* (as we have so often had occasion to observe) is put into their hands; *viz* by the power of "*nomination*" vested in the hands of the Master Packer for that purpose. In the next place, among the comparatively small number 24, in the instance of which the *choice* is *made*, and *attendance* accordingly *commanded*, "*foreknowledge*" is rendered to the purpose in question "*absolute*:" for out of these 24 who, as per list, are *summoned*, of those that *appear*, the twelve whose names stand *first* upon that same list, are the twelve that serve.

For the furtherance of corruption, the utmost that *could* have been done having thus been *actually* done, to what cause, to what *psychological* cause, having its seat in the breasts of learned and reverend Lords and Gentlemen, shall the result be ascribed? To *design?*—it would be of a piece with all their other designs, and all their other doings. To *imbecillity?* On the part of no other set of men would imbecillity be to be found, weak and palpable enough to match with it. For note once more, that it was amid the cry of corruption—actually experienced and acknowledged corruption, that this state of things, so exquisitely adapted to the purpose of that same corruption, was in and by this very statute (3 Geo. 2. c. 25.) part *confirmed*, part *organized*.

§ 9. *Unanimity increases the Aid afforded to Corruption by Foreknowledge.*

By the principle of forced *unanimity*, so long as that abomination is suffered to continue, an enormous degree of facility, as already observed, is given to the corruption of jurors: since by any *one* of the *twelve*, so that one be but sufficiently remunerated for the quantity of endurance necessary, the suffrages of the remaining *eleven* may be forced. And though, in any given instance, as matters stand, it should not be capable of being foreknown to a certainty that this or that one individual will on the particular tria in question be upon the *serving list*—foreknown, viz. time enough for administering to him the matter of corruption with effect, yet by gaining divers individuals, each of them *likely* to stand upon the *serving list*, the probability of success may in any degree be increased.

Were that flagitious principle rooted out, and the principle which gives the power to a majority seated in its place, were this done, even a slight admixture of *chance* (if it be too much to say the rational and honest principle of itself, and without the help of chance,) would suffice to render corruption in this shape morally impossible. If no number less than a majority, viz. less than seven out of twelve, were sufficient to command a verdict palpably unjust upon the face of it, no such verdict could be commanded without a completely successful application of the matter of corruption to that large number. But, taking the state of morality among the people upon the worst footing imaginable, the chance of finding, or creating on the sudden, so much depravity on the part of so large a number, and *that* out of a *limited* greater number, cannot but be extremely small: and, ere he could give himself that small chance, the corruptor would be under the necessity of putting it into the power of each of the seven to ruin him, in character at least, by covering him with infamy. Such would be his difficulty, even supposing the *twelve* who are to *serve* on the trial, supposing them, *all* of them, in their turn, at and during the quantity of time that lies open to the intrigue—all of them during all that time to a certainty foreknown. And suppose such absolute foreknowledge unattainable—suppose for example *four-and-twenty*, the number of the *gross list*, of any of whom the *twelve* upon the *serving list* may happen to be composed, it is easy to see that, to this our sup-

posed corruptor, the probability of success, and at the same time the magnitude of the danger, must, in this case, receive a prodigious increase: for, in this case, to give him the same assurance of success as in the former case, no smaller than *nineteen* is the number that would be necessary to be thus corrupted.

But upon the principle of sham *unanimity*, upon this principle which gives the command of the verdict to any one, not only if all *twelve* were foreknown might the corruptor, by the corruption of a single juryman, give himself a certainty of success, but if no other knowledge were obtained, more determinate than that of the *four-and-twenty* out of which the *twelve* would be taken, the same success, in the preparatory operation of corruption, would still give him an *even* chance of succeeding in the ultimate object of the corruption, viz. the commanding of an unjust verdict: and, by every additional juryman whom he could contrive to gain, this even chance would receive a proportionable augmentation, until by the rising of the number of the corrupted to *thirteen*, absolute certainty would even in this case be produced.

Thus stands the matter upon the supposition of a *gross list* equal in number to *twice* the *serving list*: augment the relative number of the *gross list*, the difficulty of corruption will it is evident be in both cases increased; and in each case by an amount that might be ascertained, but is not worth ascertaining for the present purpose.

One thing will be evident, viz. that on the principle which gives the command of the verdict to a *majority* out of twelve, under the *most* favourable circumstances in respect of the number of the *gross list*, corruption could never obtain a chance nearly equal to what, on the principle which gives the command of the verdict to *any one* corrupted juryman, it possesses under the circumstances *least* favourable in that respect. *Seventy-two* is the greatest number that can in any county be returned and appear for the trial of all the causes that can at one and the same assize present themselves*: and even under so great a disadvantage, if the power be in a single juryman, the corruption, though it were but of a single man of the seventy-two, gives the corruptor a chance of success, viz. as *one* to *six*. Whereas if the power be in the majority, though the num-

* Viz. by 3 Geo. II. c. 25. § 8.

ber returned and appearing be no greater than the twelve who are necessary to serve, insomuch that all who are to serve are foreknown, the corruptor may have gained *six*, or at least *five*, without having as yet given himself any chance at all *.

§ 10. *Arrangements respecting Form: viz. The Form of the proposed new Law.*

For giving expression to the operations, which, under this head, require, in my view of the matter, to be performed, a very few words will suffice. Presenting themselves as requisite in relation to *this* part of the field of law, the mention of these operations could not, on this occasion, be omitted. But, in relation to *this* part of the field, the demand for these operations cannot be more urgent, nor the propriety of them more indisputable, than they are in relation to every *other* part of the same as yet scarce cultivated waste.

1. *Consolidate* into one act all laws relative to Juries.
2. *Repeal* in the lump the whole of the existing chaos.
3. Place the whole of the rule of action on the footing of *statute* law. Of the practice of the several judicatories,

* Fifteen hundred pounds I have heard mentioned as being, in one instance that happened not very long ago, the sum at the expense of which a verdict was obtained. According to the report, it was a case of life and death: the cause being an indictment for murder, and the money given by the defendant. The fact was mentioned to me as one that had become in a considerable degree notorious: but, having no means of forming any opinion concerning the truth of it, I forbear mentioning any further particulars, lest, the story being false, suspicion should by this means come to attach itself to this or that individual, in whose instance it would be injurious.

Under the principle of forced or rather *sham* unanimity, it is easy to see what prodigious facility is given to a plan of corruption of this sort. *Do what you will,* (says the first corrupted juryman to the rest,) *I am determined to stand you out. Stand you out till you are almost starved, you will get nothing, and as you will find it necessary to yield at last, you will not succeed: for this generous man shall and will be acquitted in spite of your teeth. On the other hand, join with me in a verdict of acquittal at once, you shall have 50 l. apiece, and no more injustice will be done, than would be done if you got nothing: so that this 50 l. will be your's with a clear conscience.*

Supposing then this story to have any truth in it, I see not how, even with the force of torture thus vested in his hands by the principle of unanimity, the murderer, by the assistance of his learned friend or friends, could have effected his liberation without some degree of foreknowledge. Of some one at person at least it must have been foreknown to him that he would have to serve upon this jury: foreknown of some one person, that after being himself corrupted, he might be in a condition as well as in a situation to operate in the character of corruptor upon his colleagues.

whatsoever is approved of, adopt and give *expression* to: whatsoever is not approved of, abrogate in the lump.

4. Except in virtue of such special powers, as shall, in the tenor of the law, be thought fit to be given for the purpose, forbid all alterations and regulations that might otherwise be made in or respecting the field of *practice* in question, in and by the authority of the respective judicatories.

CHAP. II. STATE OF JURY PACKAGE IN SCOTLAND.

On this head much stands expressed in a few words.

Extract from an anonymous pamphlet published on the occasion of the Scotch Judiciary Reform, under the title of *Reflections on the Administration of Civil Justice in Scotland*, &c.: Edinburgh, for Blackwood; London, for Longman and Co. 1806.—Page 88, Note.

"The mode of appointing juries in criminal cases is most improper. The sheriff may return forty-five men chosen by him at pleasure; the judge may select any fifteen of them to compose the jury; peremptory challenges are unknown. Is it not obvious that these two officers have the fate of a prisoner often in their hands? in other words, that they can return what is termed in England *a packed jury?* Nothing should be left in criminal cases to the discretion of persons over whom the crown is always likely to have influence; and therefore it is much to be wished that a clause should be introduced in the bill, which is to be founded on the *Resolutions*, in order to regulate the appointment of juries in criminal cases."

If, in the statement thus made by an anonymous though not altogether an unknown hand, there be a syllable of truth—and by known, and well-informed and trust-worthy informants I am assured that it is correctly true—the packing system has in that kingdom been carried to a pitch of perfection equal in efficiency at least, if not in dexterity, to that which it has attained in England, and this not only where personal liberty alone, but where life and every thing else is at stake. If, in the whole population of that kingdom, electors and elected, there be a human being fit for any thing better than to serve as a tool in the chest belonging to *Lord Melville*, or a commissioner in the committee of reform, headed and characterized by that name, behold an occasion for him to show himself.

CHAP. III. HUMBLE PROPOSAL FOR RESTORING THE AUTHORITY OF PARLIAMENT.

§ 1. *Unless the Authority of Parliament be vindicated, Package cannot be abolished.*

I come now to the second of the political disorders here in question, viz. the contempt—the habitual and undisguised contempt—manifested by Judges and other subordinate functionaries as towards the authority of parliament: or rather (for in *this* consists the malignity of the disorder) the connivance—the habitual and unvaried connivance—by which this contempt has been encouraged and confirmed.

On this head, a conception that will naturally present itself to every body, and at the first glance, is—that the present is of the number of those occasions in which the difficulty consists—not so much in determining what it is that is proper to be done, as in engaging men to do what is proper to be done, whatsoever it may be.

To the justness of this remark I can find nothing to oppose: accordingly, of the two following sections, the business of the first is—to do what can be done by so weak an instrument of communication as the present, towards holding up to view the flagrancy of the disease: of the other, to present to view and in a specific shape, what seems to be the proper remedy, penetrated all the while with the clearest and acutest sense, of the minuteness of the chance in favour of its being applied.

This, bitter as it is, is a cup which cannot be put by. *Package*, it is true, constitutes that particular abuse which is the object—the only *direct* object—of the present work. But so intimate is the connection between *this* disorder and that which consists in the habitual contempt of parliament, that while this radical weakness remains uncured, any remedy that can be applied to the *derivative* malady will either be from the very first inoperative, or at the very best will in a short time cease to operate. If the authority of Parliament had not been set at nought by Judges, the package of Juries could not have been established, much less as we have seen it, openly defended: and while Parliament continues, as it has done, to suffer its authority to be thus set at nought, in vain would it endeavour to put an end to this

package; juries will, as at present, continue to be packed. To apply to this abuse the only possible remedy—I mean the only possible *direct* and *special* remedy—it would be necessary that Parliament should make a fresh law: but, if, when the fresh law has been made, Judges continue determined to deal by it as Judges have done hitherto by the existing ones, viz. to disobey it, and Parliament to do as Parliament has done hitherto, viz. to sit still, and without a thought of giving effect to its authority, see itself disobeyed, the trouble of making fresh laws, under the notion of applying a remedy to the other abuse, may as well be spared.

§ 2. *Contempt put upon the Bill of Rights, by the Lord Chief Baron's Package.*

As to the statutes, which bear in detail upon the subject of *juries*, and even in respect of the clauses in question thought to bear upon *special* as well as *common* juries, these, it is true, were, on the occasion in question, by the learned judge more particularly in question, viz. the Lord Chief Baron, violated in *intention* only, and not in *effect*: special juries having, by the fraud of the learned penman, been exempted, as we have seen*, from those provisions against corruption, the demand for which was so much more urgent in that instance than in the instance of common juries.

But though, in the manner that has been seen, the contempt entertained by this pre-eminently learned person (not to speak at present of any other pre-eminently learned persons) as towards the authority of Parliament, failed *by accident* and by misconception to fall upon these statutes at which it was principally aimed, it fell, as we shall see, *without accident*, upon another statute, I mean the statute commonly called the *Bill of Rights* †.

On looking into this much vaunted law, and in particular into those parts of it which bear upon the subject here in question, the weaknesses betrayed in it are seen to be such, as cannot be thought of without regret, the imbecility, if not the treachery of the learned penman, in whom the unlearned found themselves, as usual, under the necessity of reposing their confidence, being, on the face of

* Part II. ch. 5.

† 1 W. and M. sess. 2. c. 2.

it, but too distinctly visible: propositions, of the cast termed by logicians *identical*, fit only for the mouths and pens of drivellers: propositions, which neither conveying instruction nor imposing obligation, leave every thing exactly as they find it: propositions declaring that what is *right ought* to be done, and what is *wrong* ought *not* to be done, and so forth.

But this weakness, though to a lover of the English constitution it cannot but be matter of regret, will not, to the pre-eminently learned person in question, afford any thing like matter of excuse. For to this so much vaunted law—to this *law*, as to every thing else that bears the name of *law*, some meaning must be found: and to this law, viz. in respect of that clause in it which is here in question, no sooner will any meaning be found, than what will also be found is—that by this preeminently learned person it has been violated.

In the section in question (§ 2) two parts may be distinguished—the historical and the legislative. In the historical, the principal abuses of the then late reign are related under twelve heads; in the legislative, under an equal number of heads, the repetition of these same abuses is, to wit, by a *declaration* made of their illegality, reprobated.

In the *historical* part, of the only article which touches upon jury trial, being the article which is numbered 9, the words are as follows—"9. And whereas of late years *partial, corrupt and unqualified persons have been returned and served on juries in trials* (and particularly divers jurors in trials for high treason, which were not freeholders.)"

In the *legislative* part, in the only article which touches upon this same subject, being the article which is numbered 11, the words are as follows—"11. *That jurors* ought *to be* duly *impanelled and returned,* (and jurors which pass upon men in trials for high treason ought to be freeholders)."

In each of these two articles, there is a clause which does *not* bear upon the present subject; viz. that which speaks of *high treason* and *freeholdership*. Of the clause which *does* bear upon this subject, it must once more be confessed that, if it be not sad treachery, it is sad dotage,—" that jurors *ought* to be *duly* impanelled and returned; viz. that what in this case ought to be done, ought to be done.

In relation to the subject here in question, the law having thus in itself no meaning, to find a meaning for it we

are sent to history—to the history of the times. Consulting history, a fact that we find in every book of history that touches upon those times, is—that in the two reigns then last preceding juries used to be *packed:* that is, that, instead of being left to a mode of selection, which, with reference to the crown, its dependent judges, and its other instruments, would have come under the name of *accident* or *chance*, the persons serving as jurors were determined by *choice:* viz. by the choice made of them by these same instruments. The choice having for its notorious object the causing unjust verdicts to be delivered, persons, who either of themselves were "*partial*," or were made so by being made "*corrupt*," were taken for the objects of such choice, and, if they were not *found* so, were *made* so by that choice.

That in the exact *bulk* to which it has been swollen, and in the exact *shape* into which it has been, by our pre-eminently learned artist, moulded, the abuse relative to juries was not in the contemplation of the framers of those clauses, must I think be confessed: perfection, such as this which we have seen realized by *Lord Chief Baron Macdonald*, outstripped—not only the observation made by the *Maynard's*, the *Somers'*, the *Hawles's*, the *Pollexfen's*—but the most sanguine hopes of the *Scroggs's* and the *Jefferies's* with their *Et cœteras* of those times.

But what on the other side, cannot, it is supposed, be very easily denied is—that, in the *major* abuse of *these* our maturer times, the *minor* abuse of those immature times is included. The abuse of those days was, that after hard labour, bestowed upon the matter on each separate occasion, persons, who were *found* or *rendered* "corrupt" or in some other way "partial," were on great occasions, now and then "*returned*" and made to "*serve on juries in trials*." The abuse of *these* days is—that under the arrangements made—made and in despite of remonstrance *persevered* in—persevered in either for that purpose or for none at all, persons are on all occasions, great and small, caused to be "*returned*" and to "*serve*," persons such as, by the *permanency* with which they are invested, and the habitual, but ever withholdable *bribes*, with which they are fed, cannot but have been rendered "*corrupt*;" corrupt to a degree of corruption, of which, as surely as by any "*partiality*" it could be made to be, injustice is, upon every desired occasion, the habitual consequence.

In vain would his Lordship say,—Those whom I have caused to be "*impanelled and returned*,"—as you would say, *not* "*duly impanelled and returned*,"—are not *jurors*: they are in effect *commissioners*, and members of a *standing* board of my own framing,—persons, whom, into the box which ought to have none in it but jurors, I have so managed as to introduce, under the *name* of jurors. Those whom *you* take for jurors—those whom I have thus "*impanelled and returned*" under the name of jurors, are *not* jurors; and therefore, in causing them to be "*impanelled and returned*," even though it should not be *duly impanelled and returned*, I have not offended against the Bill of Rights.

My intention was not to "*maim and disfigure*" *the man —my intention was to kill him*: *and therefore, if you punish me as for maiming and disfiguring him*, you punish me without law. Such was the plea of a very ingenious as well as learned person, a *Mr. Coke*, who, on the Act of 22 and 23 *Car. I. c.* 1. was indicted for the maiming and disfiguring of a *Mr. Crisp*. *What I am accused of intending to do is the committing the lesser crime*: *what I really* intended to do *is only a greater crime*, *in which the other is comprized*. This plea did not avail *Mr. Coke*, and as little, if there be any thing like justice in the country, will it avail the Right Honourable *Sir Archibald Macdonald*.

But (says somebody) as one *swallow* suffices not to make *summer*, so one *act* suffices not to make a *habit*. What, in this particular instance, was done, may not perhaps have been altogether justifiable; but, if for the express and sole purpose of correcting this error, so it should come to pass, that a fresh law were made, can you, by this one instance of irregularity, hold yourself warranted in apprehending that a law so made would not be obeyed?

I answer, *Yes*: even by this *one* instance, the disobedience being so *deliberately* and *determinately*, and after such *warning* and *remonstrance*, and upon such principles as have been *avowed*, persevered in. But, of the existence of the habit, and my expectation of the eventual continuance of it, it is on this *one* act *alone* that I ground myself: and, to render it manifest, and beyond all possibility of dispute, that the contempt put upon parliament is *determined*, and rooted in a sort of *principle*, I proceed to bring to view, out of a countless multitude that might have been produced, another instance or two, such as either

the matter of the present inquiry, or chance recollection has happened to throw in my way.

§ 3. *Recent Contempt of Howard's Act by the Detention of acquitted Prisoners.*

To enumerate all the instances in which the symptoms of the disease in question have exemplified themselves, would require a volume. Of the example which here follows, the particular use is—to show the *obstinacy* of the disease: and it is only by casual symptoms, brought to light by rare occurrences, such as accident may not either bring to light or so much as give birth to, twice in half a century, that this quality in the disease can have been made manifest. In the *books*, the *contempt*—the simple contempt—may indeed be seen breaking out continually;—but it is only by *extra-judicial* conversations or correspondences, that the obstinacy of it could have been displayed in its genuine colours.

By *obstinacy* on *one* part, *energy* on some other part, and acting in an opposite direction, is implied. But in any court of judicature, on the occasion of a *cause*, no such energy ever has been known to be, or with any colour of reason could be expected to be, displayed. On the occasion of a *cause*, the only sort of person by whom any such quality as *energy* can in any direction be displayed, is an advocate. But, from the advocate, whose contention is *before* and *under* the judge, not *with* and *against* the judge, it belongs not to the station of the judge to experience anything like *adverse* energy. One common interest, one and the same sinister interest, links them together in indissoluble bands. Accommodation to indolence, gratification to vengeance, unmerited reputation, sinister emolument, lawless power,—whatsoever of all these good things the judge holds in *possession*, the advocate beholds in *expectancy*. The weakness of the legislature constitutes the lawless power of the judge: and the *present* power of the judge is the *future* power of the advocate. With the legislator his supposed superior, the judge never comes in contact: from the legislator he knows not what it is to experience resistance. The legislator makes laws: and the judge, according as it happens to them to suit or thwart his views, gives effect or inefficiency to them, as he pleases. In parliament, be his rebellion ever so flagrant, he beholds

neither *inspector* nor *denunciator*, much less an *avenger:* two sorts of men alone does *he* behold there—*admirers*—ignorant and awe-struck admirers—or *accomplices* and *abettors.*

Thus it is, that the king—I mean the king in parliament—being sunk into a *king-log*, not only the great bull-frogs, but the meanest tadpole, views his humiliation with complacency, and beholds in it a source—an inexhaustible source—of power, impunity, and triumph for himself.

Evidence of *obstinacy* in one quarter requires, as above, and supposes, *energy*, adverse energy, in another: on the particular occasion here in question thus it is, that, government being in this country in the state above described, the energy necessary on one side, and consequently all manifestation of *obstinacy* on the other, might have been wanting for any number of additional ages, had it not been for the till now unexampled union of public spirit and intrepidity—well-directed public spirit and persevering intrepidity—in the person of Sir Richard Phillips.

Materials I have none, over and above those which have already been laid before the public by *himself:* but in *his* work they stand mixed with other matter in abundance: and, for displaying their importance with relation to the design of the present work, observations have been found requisite, such as could not have come, with equal propriety, from any person, by whose testimony the facts themselves were furnished.

In regard to the degree of *credit* due to it, one very short observation may suffice. A twelvemonth and more has elapsed, since his statements on this head have been made public, and in all this time not a syllable of contradiction has appeared from any one of the official persons, whose conduct and language is here in question.—One of two things, either no contradiction *could* be given, or, in the style of the preeminently learned judge, to give it was not thought "*worth while.*"

Judges publicly charged, and by a functionary, himself in "*high,*" however subordinate "*situation*"—charged with disobedience—wilful disobedience, to parliament: and in *their* estimation so trivial the imputation, and the opinion of its truth so unproductive of all cause of uneasiness or apprehension to themselves, that whether it prevail or not is to *them* and their *feelings* matter of indifference. This being the state of judicature, in what a state is government!

The case that gave occasion to this display is as follows: By the Statute 14 Geo. III. c. 20. § 1. as copied by Sir Richard Phillips, it is enacted, "That every prisoner charged "with any crime, or as an accessary thereto, against whom "no bill of indictment shall be found by the grand jury, "shall be IMMEDIATELY set at large, in open court, "without the payment of any fee, &c."*

Of an enactment thus clear and explicit, the habitual violation is in a Memorial addressed to the Recorder of London, couched in the most respectful terms, dated the 3d of November 1807, and presented in the names and with the concurrence of both the Sheriffs; presented to the notice of that learned Judge on the 3d of November 1807. For *eleven* days no answer. On the 14th of the month, (no answer yet received,) follows in the form of a note, an address from Mr. Sheriff Phillips *alone*, to the same learned gentleman, for the declared purpose, indeed, of "*reminding him*" of the above paper, but again in the most cordial as well as uniformly respectful terms.

The season of delay was now past: now comes the season of *promptitude*, at least, if not of *precipitation.*

A few hours brought to Sir Richard an answer, from which, what belongs indispensably to the present purpose, (not to touch upon matter foreign to it) the following is an extract:

"As the commission of gaol delivery at the Old Bailey "is constituted of the highest, and of all the law autho-"rities in the kingdom, the twelve Judges of England, the "whole magistracy of the city, besides other great and re-"spectable names therein, Mr. Phillips, upon consideration, "will surely see how indecorous it would be in the Recorder "of London to discuss and argue of the power, authority, "and practice of that Court, with one of the Sheriffs, who, "however privately esteemed and regarded by the Recorder, "is, with respect to that commission, but an officer and "minister of the Court."

Business, at least where the *public* has an interest in it, does not, we shall see, linger with Sir Richard Phillips. Not after an interval of *eleven* days, but on that *same* day, in reply goes another note from him to the same learned Judge, always in the same style of unvarying respect, but expressing "*his earnest hope*" that the necessary measures

* Phillips, pp. 62 to 68.

would be taken for paying obedience to the law; and stating amongst other matters, "that he understood, in a late "conversation with *Lord Ellenborough* on this very sub-"ject, that points of practice in the Old Bailey Court rest "chiefly, if not entirely, with *the Recorder*, as the law "officer of the corporation."

Thus, had it depended upon Mr. Recorder, would have ended the whole business. Fortunately "within a few "weeks after," the Sheriff, as he tells us, "had an op-"portunity of pressing the subject again on the notice of "the Recorder, when (continues he) he peremptorily told "me, that *he never would* consent to the alteration in the "practice of the Court which I proposed, and as long as "he lived it should continue as it is."

Thus far Sir Richard Phillips. As to Mr. Recorder of London, for my own part, if, with any propriety, I can be said to have any personal acquaintance at all with that learned Judge, it is of no other sort than what, as towards him, would tend to cherish in my mind those sentiments of respect and regard which were so uniformly manifested towards him by Sir Richard Phillips.

But, though a very obscure and insignificant person, I have the honour to be a British *subject*. I say *subject:* for on *that* ground, rather than on so *technical* and *narrow* an one as that of *freeholdership*, do I choose to rest my claim. I am a British *subject;* and, in that character, I feel as strong an interest in the *preservation* of the English constitution, as any one can feel in the *preservation*, or even in the *destruction* of it. And, in consideration of this interest it is, that it seems proper for me to declare—that, although instead of being that great person to whom, by the description of *points of practice*, this part of the liberties of Englishmen is, it seems, "*bargained, assigned*, "*transferred*, and *set over*," by the *twelve Judges*, he were my brother, my opinion concerning him would still be this, viz. that if it really *were* the case, that the continuance of the practice depended upon his life, the last day of that life would to his country be a most happy one.

A conspiracy of the *twelve Judges*, with the Recorder of London *at their head*, (for such it seems is the new order of things)—a conspiracy of the twelve Judges with their ringleader the Recorder, for mending the constitution of the country, by resisting, over-ruling, and treating with *avowed* contempt, the authority of parliament!—Such is

the state of things, brought to view by this evidence. Such is the state of things which I would wish to recommend to the consideration, the serious consideration—of all such British subjects, if any such there be, in whose eyes the preservation of the constitution of the country is of more value than any share which in the character of lawyers, or confederates with lawyers, it may happen to them to look for in the plunder of it.

" Mr. Phillips, upon consideration, will surely see how " *indecorous* it would be in the Recorder of London to dis- " cuss and argue of the power, authority, and practice of " that Court with one of the Sheriffs, who is but an officer " and minister of the Court." No, if in any such *argument* Mr. Phillips could have seen any thing *indecorous, his* view of the matter would, I will confess, have been very different from mine.

Indecorum in arguing, in relation to the point in question, the practice of the Court? No:—but something a great deal worse then *indecorum*, in the determination, the obstinate and rebellious determination—to continue in such practice.

The House of Commons—yes, the House of Commons—*there* is the place, at which the discussion on this question should *now* be carried on. As to *argument*, of *argument*—of further *discourse*, unless what as above is stated to have been his language, be not only in tenor but in purport denied to have been so—of further discourse, in *any* shape, on the part of the learned gentleman, there is no need:—*hearing* is for him the only ulterior function needful: *hearing*, his *function*, *genuflection* his proper *posture*, for the performance of it.

The *inhumanity* of the practice, its rank and bare-faced *injustice*, the *oppression* thus heaped—heaped upon injured and established *innocence*—the contrast it makes with their principle of *nullification*—the instrument manufactured by their partnership for dealing out impunity at their own pleasure, and their own price—for dealing it out, not to merely *possible* only, but to convicted guilt *—all these are subjects which must for the present be discarded, as being foreign to the design of the present work, as well as of the present chapter. The subject which alone belongs to the present purpose is the subversion of constitutional

* See Scotch Reform, Letter 1.

order—the contempt—the wilful, the deliberate, the confederated contempt—of that supreme power, the supremacy of which is in words acknowledged, and in grimace bowed down to, even by themselves.—Alas! by what terms can such enormity be expressed? The very language sinks under it*!

* Incomprehensible as this pertinacity may appear on the face of it, the root of it may, I have been led to think, be traced to certain extortions that, so long ago as in the year 1777, were brought to light by Howard The principal passages, extracted from his "State of the Prisons, &c." 3d Edition, *Anno* 1784, pp. 15 and 16, are here subjoined. Between the extortions of that day as exhibited by Howard, and one of the oppressions of the present day as exhibited by Sir Richard Phillips, evidence of connection having been observed, the display of it was at one time destined to form part of the present work: but the length of it being found altogether disproportionate, it has been necessarily discarded for the present, though on some future occasion it may perhaps find its place.

Including some remarks on the above mentioned Statute, (14 Geo. III. c. 20) to which Howard will be seen to allude, being one of the feebly-protecting statutes to which the ill-seconded exertions of that truly *Christian hero* gave birth, the deduction would be found to present a curious-enough picture of *parliamentary* and *super-parliamentary* lawyer-craft, forming no unsuitable match with that which stands exhibited in the 5th chapter of the second part of this work.

'Although acquitted prisoners are by the late Act in their favour (14 'Geo. III.) cleared of gaolers' fees, they are still (says he) subject to a similar 'demand made by the *clerks of assize* and *clerks of the peace*, and detained in 'prison several days after their acquittal: at assize till the judges; at quarter 'sessions till the justices of peace, leave the town; in order to obtain those 'fees, which the gentlemen say are not cancelled by the Act. And yet the 'express words of it are, "*Acquitted prisoners shall be immediately set at large* '*in open court.*" It is evident then that all fees of the commitment in respect 'of the prisoner, are by this Act totally abolished.

'Since the said Act, the clerks of assize in some circuits have started a new 'demand upon the gaoler, for the judge's certificate of acquitment: viz. six 'shillings and eight-pence for the first prisoner acquitted; and a shilling for 'each of the rest, or two shillings for every one. I have copies of two re- 'ceipts given by the clerk of the Western circuit to the gaolers of Exeter and 'Salisbury. One of them is as follows: "Received 1 April 1775 of Mr. '"Sherry, gaoler, one pound eight shillings and eight-pence, for his certifi- '"cate entitling him to his gaol fees for the county of Devon, from J. F****, '"clerk of the assize." The gaoler told me this was for twenty-three ac- 'quitted prisoners.

'I was informed at Durham, that judge *Gould*, at the assizes of 1775, laid 'a *fine* of fifty pounds on the gaoler *for detaining* some acquitted prisoners for 'fees of the clerk of assize. But upon the intercession of the Bishop, (pro- 'prietor of the gaol) the fine was remitted; and the prisoners set at large; 'the judge ordering the clerk of assize to explain to him in London, the foun- 'dation for this demand.

'One pretence for detaining acquitted prisoners is, that "It is possible 'other indictments may be laid against them before the judge leaves the 'town." I call it a *pretence*, as the grand jury are often dismissed some days 'before that time, and because those who do satisfy the demands of the clerk 'of assize are immediately discharged. Another pretence is, the goaler tells 'you "he takes them back to knock off their irons." But this may be done

§ 4. *Parliamentary Operations proposed.*

Under this head, a few short and compressed hints are as much as, if not more than, will be found "*indurable,*" especially, under *the Perceval* dynasty, from a self-created censor, who has neither a coronet in his pedigree, nor so much as a place in the *red book.*

I. *Committee of Inquiry*, to collect and report the facts.

Subject of inquiry, cases of disobedience to Acts of parliament on the part of persons *concerned in the administration of justice*; limitation necessary, at least in the first instance, confining the remark to such cases in which *misconception was impossible.* No fear, that *by* this restriction the work would be left without materials to operate upon. *Without* such restriction the work would have no end.

To render the import of the restriction clear, an example or two will suffice. Cases which have more or less of *arithmetic* in them will in general be found to afford the clearest samples.

1. *One* such has been brought to view already. *Law*, prohibiting the giving, on such or such an occasion, to a person of such or such a description, money to the amount of more than *one* guinea. *Official transgression*, on an occasion of that same description, to a person of that same description, sum given, two guineas. See above, Part III.

2. *Law*, in a case therein described, giving to the successful party *double* costs:—*official transgression*—and here the office is *judicial*—giving, and that avowedly, instead of the *double* costs, *single* costs with an addition of only *half* single costs. Acts of parliament upon which contempt has been poured in this shape are to be found in swarms, they are pointed out by the indexes.

'in court: in London they have an engine or block, by the help of which 'they take off the irons with ease in a minute; the machine is brought into 'court, and the acquitted prisoner is immediately discharged. If, according 'to what I proposed, prisoners were tried out of irons, this pretext would be 'entirely removed.

'Clerks of assize, and of the peace, ought most certainly to have a consi'deration for their service to the public; the thing I complain of is what I 'am led to by my subject, that is, the demand that is made directly or indi'rectly upon *acquitted* prisoners *.

' * The clerks of assize give to the judge, large sums for their places. One 'of the present gentlemen gave for his place 2,500*l.* On many accounts these 'places ought not to be *bought* of the judges. If they were only *presented*, the 'fees might be much lower.'

3. *Law*, as above, giving to the successful party *treble* costs:—*judicial transgression*, giving, instead of the *treble* costs, *single* costs with the addition of only *three quarters* of the amount of single costs. Another swarm of statutes, upon which the cup of contempt has thus been poured to the very dregs.

II. *Parliamentary Resolutions.*

The habit of transgression established, what shall then be done?

The least that can be done is for the House (I suppose it the House of Commons) to pass a string of *resolutions*, condemning the practice, and denouncing eventual punishment in future. Happily this House, in conjunction with the other, possesses, in the right of addressing the king for removal, a virtual power altogether adequate to the purpose. *Resolved, that in case of any misinterpretation put from henceforward upon any Act of parliament, by any Judge or Judges, should such interpretation be deemed* wilful, *this House will address his majesty, praying the removal of such Judge or Judges.* After *wilful* add, if necessary, *and not proceeding from error in judgement merely.* Something to this effect may serve as a sample. But to fix the meaning, and save it, if possible, from being explained away, an example or two, as above, if the *law of the Medes and Persians* would admit of any such innovation, might be of use.

As to *retrospection* in any shape, on this question victory must, for any part I shall presume to take, be left as a prize to eloquence. Honourable gentlemen, according to whose theory *bulls* take a pleasure in being *baited*, may try it upon *Judges.*

If the measure they so freely mete to others *, were to be meted to them again (I speak of Judges), the question would be decided, and the *benches cleared.* But, in *my own* view of the matter, this measure, being in every application that can be made of it, a most false and mischievous one, it depends not upon them, by any use they can make of it, to make it otherwise.

§ 5. *Retrospective Censure, is it to be looked for?*

The notion upon every occasion assumed and taken for granted among lawyers is,—that to the Judges—meaning

* Instead of *general utility*, *antipathy* the *ground* of punishment—*intensity* of the antipathy the *measure* of punishment, *retrospective* the *application* of it.

the twelve Judges and the Chancellor—acting respectively in one or other of their many and various spheres—belongs the interpretation—the *uncensurable* as well as unappealable, and thence the absolute and uncontrollable interpretation—of whatsoever goes by the name of *law*: viz. not only of that *spurious* sort of law, which, by the oscitantcy of parliaments they have been suffered to make—to make *of* themselves and *for* themselves—but also of that only *genuine* sort of law, which is made by parliament.

In certain cases indeed, but in certain cases only, the transaction being, in some shape or other, capable of being brought before the House of Lords, the conduct of these official lawyers may to *some* purposes be weighed by *other* hands, be weighed by *non-learned* hands. But, forasmuch as where any judicatory composed of any one or more of these *thirteen* potentates is in question, every idea of *censure* is excluded; *reversal*, or *modification* of the judicial transaction, is the only purpose to which *revision* is considered as capable of being performed: and though, in point of *right*, *non-learned* Lords cannot, on *these*, any more than on any other occasions, be avowedly debarred either from *speech* or *vote*, yet, in point of *fitness* and *propriety*, the very appellation thus incontrovertibly applicable to them, suffices to indicate, how incongruous, on *these* occasions, any interposition from so weak a quarter would be deemed—if not for the purpose of *reversal* or *modification* of the interpretation itself, at any rate for any such purpose as that of *censure* to be passed on the *interpreters*.

In the putting of any such interpretation, being still but *men*, (for this concession, such is their candour and humility, they may be depended upon for making)—in the putting of any such interpretation they are liable to fall into *error*: but, be that error what it may, at least so as *competency of jurisdiction* be out of dispute, it never can be so much as *censurable*, much less *punishable*.

Now in this I cannot but behold a doctrine, against which, had I a hundred hands, I would protest with all of them, as being inconsistent with all government. Admit *this*, parliament is but a tool—a corrupt as well as a blind and passive tool—in the hands of lawyers and their confederates. Admit but *this*, transgression will be heaped upon transgression, till the whole *power* of the country, and with it, in due season, the whole *property* of the country, will be avowedly in their hands: admit but this, sooner or

later they will *construe* the whole *money* of the country into *fees*, as at one time the clergy were on the point of consecrating the whole *land* of the country into *church-yards*: since, let them carry their usurpations, their oppressions, their extortions, to ever so enormous a length, they have never any thing to *fear*, they have still every thing to *hope*, or rather to *make sure of*.

Reading or thinking of those judges, whose sanction was lent to *ship-money*, ah! how innocent were *those*, (a thousand times have I said to myself,) in comparison of these of *modern* times! How much more clearly was *their* transgression a transgression against *the common welfare*—against law *as it ought to have been* than against law as it *then was!* By what a host of *precedents* was it not sanctioned! and, when *statute* law is out of the question, of what stuff is *law made*, or so much as *pretended to be made*, if not of *precedents?*

§ 6. *No fresh Acts requiring Obedience to existing ones.*

But above all things let us have no *fresh law*: I mean for the mere purpose of causing the existing ones to be obeyed: no enacting or re-enacting statute; still less a *Declaratory* act.

A declaratory Act?—Observe the consequences. A falsehood committed: the supremacy of the king in parliament *abdicated*, *surrendered*: surrendered to the lawyers; and on so easy a condition—*to them* of all mankind so easy—as the employing false pretences in the exercise of it: pretending to have had "*doubts*," where it is impossible they should have had any:—pretending to have put upon a word a meaning, which it is impossible they should have put upon it.

In the first place a falsehood committed. "*Whereas "doubts have arisen* . . ."—Doubts arisen? doubts about what? whether *immediately* means *immediately?* Are lawyers the only persons who know what *immediately* means? are all but lawyers ignorant of it? After this first falsehood —committed by parliament itself—after this falsehood, and by means of it comes the *abdication*—the *surrender*—and the endless train of *falsehoods*—falsehoods *bespoken* of judges, by an order so clearly given, and which with such regular alacrity would be executed.

Yes:—to make a fresh Act would be actually to yield

the point to the lawyers, to *confirm* the usurpation instead of *checking* it. It would be allowing them the very *negative* in question: the negative which, without as yet daring to *claim* it, they have been exercising: a negative, which they want but this allowance to exercise *at pleasure*, and at *any* time, upon *all* Acts. Take at pleasure any one future Act: the negative having (suppose) been exercised upon *that* Act, the worst that could happen would be *another* Act: which Act when passed would be just as completely subject to their negative, as its predecessor was: and so *toties quoties*. By every such Act the uncertainty—"the glorious uncertainty of the law"—would receive fresh confirmation, and, if possible, fresh increase: the *uncertainty* of the *law* and the *certainty of ruin*, to every man, not above the common ranks of life, who with the words of it before him, should be ill enough advised to ascribe any thing like *certainty* to it.

Taking cognizance of a *murder*, and inflicting punishment accordingly, the Judges of the *Common Pleas*, acting as such, would themselves be *murderers*, and as such punishable. This is what our men of law themselves have not scrupled to declare*. Why? because in this purely ideal case, if the *authors* of the transgression are *lawyers*, so are they also who are to *judge* of it and to punish it.

Here then *is* a transgression on which, according to their own doctrine, punishment may attach, even though the transgressor be a *Judge*, acting in his character of Jûdge.

Allow then, (says a loyal subject to these disloyal usurpers,) allow then, that where the law transgressed by you is a law of the *King's* making—made by the King in parliament—allow that in *that* case, if, to the conviction of every man that sees the words of the law, your transgression has been a completely wilful one, you are not exempt from punishment,—allow but *this*, this is all we want of you. What we do *not* want is—to see you in any such posture, as that which, in the case of *your own* putting, you would figure in. But what we *do* want to see you in is—a *kneeling* posture, if not literally, at least figuratively: kneeling, like one of king James's parliaments, "*upon the*

* *Hawkins*, P. C. vol. i b. i. ch 31. § 66)

"*knees of your hearts*:"—yes, and in this posture we must see you, or *parliament* is a laughing-stock—*you* tyrants—and *we* slaves.

The constitution, in short, is already at an end, and the government a mere tyranny in the hands of the Judges, if, to save them harmless against the punishment due for a transgression committed by them against the law, it be sufficient to them in all cases, or even in any case, to say *such is the construction that we put upon it*: if, in the instance of this as of every other set of men, for the purpose of condemning them and if guilty punishing them, it be not to whatever authority it belongs to sit in judgement on their conduct, competent, if so it appear, to pronounce that the allegation, express or implied, of their having believed such and such to have been, on the occasion in question, the intention of the legislature, is not true.

To the meanest subject that is to be found—to him on whose part, not only in relation to the particular *import*, but in relation to the very *existence* of the law in question, ignorance is at the same time most certain and most excusable, such ignorance affords not, in the breast of those arbiters of his fate either *justification* or so much as *excuse**: and by the mere supposition of it, and that an untrue one, shall such ignorance afford not only *excuse* but *justification* to those in whose situation, even without other transgression, such ignorance—ignorance of the law—is itself a crime?

No:—neither on this nor on any other occasion: no; on no occasion, nor on any account, on the part of learned gentlemen will there be any objection to fresh Acts. Fresh Acts, besides evidencing, on an occasion such as this, the impotency of the authority that made the former ones, make, on every occasion, fresh *confusion*, and fresh *fees*. Fresh Acts make the pot boil brisk in the little kitchen of the attorney: fresh Acts make the *cauldron* boil brisk in the great victualling offices attached to higher *feed* as well as *fee-fed* situations.—No:—on any occasion there will not, on the part of lawyers *in general*, be any more objection to fresh Acts than on a particular occasion there was, on the part of *Lord Melville*, to the bringing in, and carrying into a law, a bill for preventing a paymaster of the navy from applying the money of the people to his own use. On these sub-

* *Ignorantia legis excusat neminem.*

jects the understanding has been general and constant. So far as the *binding* and *punishing* force of the laws bears upon men who neither are in *power*, nor are to receive *protection* from men in power, so far they are to be *executed*: so far as they would bear hard upon men who *are* in power, or under the protection of men in power, so far they are to be *laughed at*.

In a word—to employ a system of classification the nomenclature of which is become as generally intelligible as the principles of it have been generally pursued—"*tinmen*" and "*great characters*" form the two *species* into which, to this purpose, the *genus* of his majesty's subjects has been divided. What then is "*the use of the law?*"—*Bacon*, who started the question, talked about it and about it, but it was reserved for his successors to give a clearer answer to it. What is *now* the use of the law?—to fall as a millstone *upon* the heads of "*tinmen*," to stand as a laughing-stock to "*great characters*."

§ 7. *Prospect of Redress.*

But, these remedies of yours, by what hands are they to be administered?—Lawyers? You will find none willing: non-lawyers? You will find none able.... And when all lawyers and all non-lawyers are substracted, how many have you left?

I answer—to the difficulty of this remedy no eye can be more acutely or profoundly sensible than his are who thus ventures to propose it. But, under favour of the inexhaustible stock of varieties incident to the human character, causes of a *psychological* nature, inscrutable to human eyes, have manifested, now and then, their power, in the production not only of *evil* but of *good*; yea, and will continue to do so little by little: of *good*, in whatsoever shape, *good* is at the same time *conceivable*, and in a physical sense, *practicable*. In one age, A proposes: in another, B moves: in a third, C carries into effect. This is the rate at which *Reform* and *Improvement travel*, when the *Surveyors of the Highways* are Lawyers.

Assuredly had it been my lot to find myself in the place where *motions* are made, some five and-twenty or thirty years ago, a *motion* for a *real Committee of Justice* would at least have stood upon the Journals.

A Committee of Justice?—Oh, yes; turn to the Jour-

nals, and *there* you may see—not a parliament in which you may *not* see—a Committee of Justice. In *that* place you may see it: but in that place you may as well content yourself with seeing it: for, until something which *would be* called *confusion*, take the place of that which *is* called *order*, you had better not expect, unless you are fond of disappointment, to see it any where else.

Regular as is the appointment of this regular committee, the functions of it compose a *sinecure*: a sinecure nó less regular and profound than if the *Perceval* allowance of 38,574*l.* a year, (reduced, alas! to less than 13,000*l.* we are told, by deductions that somebody or other knows of *,) were attached to the situation of each of its members, in recompense for the labour of receiving the emoluments, added to that of being *said*, without being so much as *supposed* to do the duties of it.

But when *sinecures* are *gone*, *Justice*, with the Committees necessary for her restoration, may then *come*.

Such is the state of things at present. Such will continue to be the state of things, until, in some shape or other, *censure*—prompt as well as impartial censure—not to speak of *punishment*—shall take place of tardy and disregarded laws:—of *declaratory* Acts, and *explanatory* Acts, passed some score or some half hundred years after the Acts, those Acts that wanted not to be *explained* but to be *enforced*, had, *instead* of being enforced, been trampled on by "*great characters*," or explained, and explained away, or what is shorter, openly scorned and trampled upon by *Judges*.

Whether law or tyranny reigns, is a question that will be decided by the notice or no notice taken in "*high situations*," and eventually in *low* ones, of this grievance. Till now, the tyranny had a mask: but now the mask is gone.

Great zeal every where for the maintenance of *subordination*. Subordination?—But of what sort?—Not of that of which *universal security* is the fruit: but of that, by which, for the benefit of "*great characters in high situations*," all but they, their confederates instruments and dependents, are kept in a continual state of insecurity and bondage.

* Finance Committee, an. 1808, Report 3.

Observing the House of Lords to have at length, by the continually increasing accumulation of *causes*, become, in respect of its appellate jurisdiction, converted into a sort of *delay-shop*, in which in pieces of an indefinite number of years' length, delay is sold to dishonest men with other men's money in their pockets,—observing, moreover, the grievance to be to such a degree flagrant and notorious, as to have been publicly and repeatedly held up to view in the house itself, by the only persons by whom any plan of relief, it is universally understood, could, with any prospect of success, or, according to received notions, with any sort of congruity, be laid upon the *table*—in the month of January 1808, I took upon me to transmit to such of the members of both houses as could conveniently be reached, the outline of a plan, (accompanied in every article with *reasons*,) which I had sketched out for that purpose, under the title of a "*Plan of a Judicatory, under the name of* THE COURT OF LORDS' DELEGATES."

In my own mind a still more important, though not an inseparable, part of that plan, consisted in the transferring moreover to the proposed judicatory that part of the *immediate* jurisdiction of the House of Lords which consists in the cognizance of *impeachments:* the decision of the delegates in those cases to be *final*, *unless* reversed or modified by the house at large, on the declared ground of *censurable misconduct* on the part of those their delegates.

The main principle, on which this plan was grounded, was no other than that which, whether ever expressed or no in words, will in substance be found to have served as the main principle of the *Grenville Act:* viz. that the sense of *responsibility*, without which there can be no tolerably adequate security either for *probity* or *intelligence*, is less and less acute and operative, in proportion as the number of those whose share in it is extensive.

It was at this price only, as it seemed to me, that *impeachment*, already proclaimed in parliament as having sunk into an empty name, could be restored to that character which it was originally designed, and till of late was universally supposed to possess, and which at different times it has in some degree possessed, viz. that of serving as a check upon *political* delinquency in "*high situations:*" and this, without consuming in *judicature* any part of that time which is so habitually found insufficient for the still higher and more important functions of *legislation:* to the

end that the judicial authority of the country might upon occasion be employed in *checking*, *removing*, and in case of need even *punishing*, instead of being, as at present, exclusively and avowedly employed in *protecting* "*unfitness*" on the part of "*great characters*" in high "*situations* *:" *punishment* being reserved for such low people as, having the misfortune of suffering from such "unfitness," have the audacity to complain of it.

Of a censorial tribunal so constituted, what did not present itself to my view as the least important use, was—the application of a check to that corrupt despotism, to which, as above, except in name and empty show, there exists not at present any check, viz. the despotism of the Judges.

Not only in my own mind, but in my own papers, the plan had in it yet *other* parts, the object of which was to invest the Lords, by the instrumentality of these their *appointed* and *periodically removable* delegates, not only with the *power*, but with the *interest*, (without which *power* is nothing) that seemed necessary to engage and fix them in the habit of rendering to the community certain services which, by the necessary changeableness of its composition, the *House of Commons* is disabled from rendering with equally assured steadiness and perseverance: one of these services being the instituting and keeping up an uninterruptedly periodical series of *returns* and *accounts*, expressive of the *state* of the system of judicial procedure, under a set of *preappointed heads*, embracing the whole field of judicature, and bearing specific reference to the several distinguishable *ends of justice:* the other, the taking occasion of such causes as should come before this judicatory in the way of *appeal*, to facilitate the gradual conversion of the *rule of action*, out of the purely conjectural, tenorless, uncognoscible, and impostrous state of *unwritten*, *alias common* law—the shapeless production of a set of note-takers, compilers, and publishing booksellers—into its only cognoscible, determinate and unimpostrous state, viz. that of what is called *written* or *statute law:* the joint and genuine work of the king, the lords, and the delegates of the people.

For such plan, no efficient acceptance could either be expected or so much as wished, if by the establishment of it the preponderant weight and influence of the more

* See Part I. ch.ix.

essential branch of the constitution were exposed to any danger of being lessened: but that no such danger could attach upon it, could easily, and would have been actually, put out of doubt.

That, in the opinion of leading persons of opposite parties, the above plan (meaning of course such part of it as had in the above paper been presented to view) possessed a claim to serious attention, was a fact of which I found reason to make no doubt: and, on one part, such and so public was the opinion expressed concerning it, as to render it evident that in one event, nor that altogether an improbable one, should the same opinion continue to be entertained of it, the establishment of it would be but a natural consequence.

Had the expression of such opinion been in any instance addressed to, or accompanied with any such intimation as that of a desire that it should be, or a thought that it would be, communicated to the person whose proposal was the subject of it, the communication might have been ascribable to that sort of civility, from which any serious thought about the matter is not always to be inferred: but the communication having in every instance been the result of mere accident clear of all design, and probably to this hour not merely unheeded but unknown, the real existence of the opinion is in each instance but so much the less exposed to doubt.

In one instance my satisfaction would, I must confess, have been more entire, if, when reflecting on past occurrences, it had been in my power to assure myself that that part of the plan which by the author had been regarded as a *drawback*, though that an indispensable one, from the mass of advantage expected from the institution, had not in other eyes constituted at least a principal *recommendation* of it.

But among those who are agreed about *measures*, it would be not only a useless but a pernicious refinement to look out for differences about *motives*.

Nor would any such topic have been touched upon, but that regarding the proposed institution, as above, as capable of operating in the character of a highly useful, if not of itself a completely effectual remedy, to the political disease of which so much has just been said, the design of this work seemed to require, that of the plan in question such part as has already seen the light should now receive

the same degree of publication as this work itself does; for which purpose, copies of it have now been transmitted to the publishers.

Of this increased publicity one consequence is—that in the mind of him by whom the observation shall have been made, (and by whom will the observation not have been made?) that a necessary part of the plan consists in the creation of several new situations, of which some could not but be in a preeminent degree *lucrative* ones, a supposition too natural not to follow in a manner of course will be, that in this proposed mass of emolument some share had been looked for by the projector: and that, in his mind, it was the advantage so looked for that had constituted—if not the *sole*, at least *one*, final cause—of the project. It therefore, as mankind are constituted, appears to me to be, if not absolutely necessary, at any rate highly conducive, to the unbiassed examination of the plan, to declare, as I do most distinctly, that in any emolument that ever was proposed or may ever come to be attached to it, I never had, nor ever shall I have any more concern, than any other person under whose eye the present page may be lying at this moment: and that, in the contrivance of it, no person by whom for himself or any friend of his any expectation of any part in such emolument could have been entertained has ever been consulted with: no person having been in fact consulted with upon the subject, either before the paper went into circulation as above, or since.

Not that the plan is in itself awhit the better, or the less bad, for a circumstance thus collateral and accidental to it: and should any plan for the same purpose ever be brought on the carpet by any other hand, the author may be assured that no personal advantage that may be found included in it for his own particular benefit, or that of any of his friends, will by me be pleaded in bar to the acceptance of it. In my view of the matter, be the measure what it may, instead of a *bar*, any advantage accruing to an individual, constitutes, I must confess, a plea *in favour* of it. The indication of any such advantage coupled with the appellation of a *job*,—this argument, as it is a very easy and a very common, so is it a very commodious argument for such politicians as being conscious of their inability to form any *direct* and specific estimate of the advantages and disadvantages of any plan which requires hands for the execution of it, have recourse to this circumstance in the character of an

article of *circumstantial* evidence, and that conclusive, establishing, and that at so small an expense as that of a single word, not only the ineligibility but the corruptness of the measure:—but it will not pass in any such character with any man, who, being duly aware that, in all its branches, government consists but in a choice of evils—evils produced that in each instance greater good may come—holds himself, on the occasion in question, not incompetent to the task of weighing the good against the evil, and determining on which side the balance is to be found.

Supposing the plan in question received as above in all it's projected parts, *the Court of Lords' Delegates* would, without the name, add to its other characters that of a *school,* and that not only of *judicature* but of *legislation:* a school in which such of our noble youth, (supposing any such to be found,) to whom the *study* might not any more than the practice of that art does at present appear beneath their *dignity,* might find the means of *instruction* as well as *exercise:* a school in which, not only the *exercise,* but by means of the exercise the *prizes* might, instead of remaining a monopoly in the hands of those whose interest it is that the body of the law be in all its points in as bad a state as possible, lie open to those also whose interest, in the shape of reputation and conscience, would on this occasion act in *alliance* with their duty, and whose interest would not, at any rate, be in any shape at *variance* with it.

Lastly, being occupied in preparing with all expedition for the press a work on *Parliamentary Reform,* in which, if my own conception of the matter be correct, the necessity of such a measure is placed beyond the reach of doubt, followed by a plan for that purpose, accompanied in each article with *reasons* and answers to objections, (a plan in the contrivance of which I saw but little reason to go in quest of novelty) it seemed to me of use, that it should be understood, and that most clearly, that to engage a man's opinions and affections in favour of such a measure no other propensity is necessary than a desire—not to pull down but to uphold—not to wrest power out of the hands of present possessors, but to render them somewhat less generally and flagrantly inept than at present for, as well as disdainful of, the exercise of it: that so, when among those questions which sooner or later will inevitably be urged, this also should be put—viz. what are the occupiers of that *room* with the *gilt chair* in it good for, unless it be to serve as

tools in the hands of the ——— *general*, who now and then comes in form and sits in it—a set of implements constituting, when put together, a clumsy piece of machinery for producing the effect of a simple negative—those to whom any such searching question happens to be addressed, may have some better answer at hand than what has been furnished by the threadbare and transparent fallacies that have hitherto been seen to be employed upon that service.

The *Hospital of Incurables* was a name invented for that *great room*—not by any such plebeian as myself, but by a *noble practitioner* (the Earl of Chesterfield) to whose penetrating eye the condition of all the *wards*, with all the *patients* in it, had by long observation and experience been rendered so familiar. By him, as the name thus bestowed bears witness, the condition of the inhabitants was regarded as already desperate. For my own part, whether it be that being more given to *hope*, and less to *satire*; as well as somewhat more accustomed to look out for expedients, than that veteran courtier, my judgment has been led astray by my affections, my views of the case are less desponding. As *hospitals* are apt to be, and as this in particular was once pronounced to be*—pronounced so by the inhabitants themselves when not half so numerous as at present—it appears to me, as it has done to others, too much *crowded*; in which case it is the less to be wondered at, if, of a species of *vital gas* known in the *old nomenclature* by the name of *public spirit*, a morbific deficiency should be found:—a deficiency, of which the principal effects and symptoms are an habitual lethargy and prostration of strength, admitting of no abatement but what may happen to be produced by the accidental pricking of some such *stimulus* as that of *a canine appetite for fat sinecures*. For the *over population* the remedy is too simple, as well as by those whom it concerns most nearly too well approved†, to need any further mention in this place. As to the *public spirit*, the apparatus for the injecting of it has been already indicated.

* See Blackstone's Commentaries, i. ch. 2. p. 152. Ed. 1765.

† Ibid. "In the reign of king George I. a bill passed the House of Lords, and was countenanced by the then ministry, for limiting the number of the peerage."

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List (hastily and imperfectly collected) of such of the works of JEREMY BENTHAM, *as are in print, set down in the order of their dates. (Several of which may be procured of* EFFINGHAM WILSON, *Royal Exchange). Those marked* * *have been published, but are out of print. Those marked* || *have never yet been published.*

1. Fragment on Government: being a Critique on some passages in Blackstone's Commentaries. Anonymous. Anno. 1776. 8vo. pp. 265.*

2. View of the Hard Labour Bill, with Observations relative to Penal Jurisprudence in general. 1778. 8vo. pp. 114. A few from Payne, price 3s.

3. Defence of Usury, 12mo. First Edition, 1787. Third Edition, published in 12mo. with Second Edition of Protest against Law Taxes. 1817. Price 7s.

4. Introduction to the Principles of Morals and Legislation, 1789. 4to.*

5. Panopticon: or the Inspection-House: containing the idea of a new principle of Construction applicable to any sort of Establishment, in which persons of any description are to be kept under Inspection; and in particular to Penitentiary Houses, Prisons, Houses of Industry, Work-Houses, Poor-Houses, Manufactories, Mad-Houses, Lazarettos, Hospitals, and Schools: with a Plan of Management adapted to the principle, 1791, 2 vols. 8vo. Payne and Foss, price 14s.

6. Draught of a Code for the Organization of the Judicial Establishment in France: with Critical Observations on the Draught proposed by the National Assembly Committee, in the form of a perpetual Commentary, 1790 or 1791, 8vo. 242 pages very closely printed.||

7. Essay on Political Tactics: containing six of the principal Rules proper to be observed by a Political Assembly, in the process of forming a Decision: with the Reasons on which they are grounded; and a comparative application of them to British and French practice: being a Fragment of a larger Work; a sketch of which is subjoined, 1791, 4to. pp. 64 ||

8. Supply without Burthen; or Escheat *vice* Taxation: published with 1st Edition of Protest against Law Taxes, 1796, small 8vo. or 12mo.*

9. Emancipate your Colonies: an Address (thus intituled) by Jeremy Bentham to the National Assembly of France, 1793, 8vo. pp. 48. "Your "Predecessors made me a French Citizen: hear me speak like one," &c.||

10. Pauper Management: a Letter on the Situation and Relief of the Poor: addressed to Mr. Arthur Young, Editor of the Annals of Agriculture, and published in that Work, 1797, 8vo. pp. 288, with Tables.

11. Letters to Lord Pelham, &c. &c. &c. "giving a comparative View "of the System of Penal Colonization in New South Wales, and the Home "Penitentiary System prescribed by two Acts of Parliament of the Years "1794 and 1799;" viz. in consequence of an acceptance given to a Proposal of the Author's, grounded on the Plan delineated in *Panopticon* as above, 1802. 8vo.||

12. Plea for the Constitution, 1803: written in continuation of the above.||

13. Scotch Reform, compared with English Non-Reform: in a series of Letters to Lord Grenville. 1806. 8vo. pp. 100 closely printed: relative to the Judicial Establishment in Scotland and England. Ridgway, price 6s.

14. Elements of the Art of Packing, as applied to Special Juries: particularly in cases of Libel-Law. 8vo. pp. 269, printed 1810, published 1821, Effingham Wilson, Royal Exchange, price 10s. 6d.

List of Mr. Bentham's Works.

15. "*Swear not at all*," containing an exposure of the Needlessness and Mischievousness, as well as Anti-christianity of the ceremony of an Oath with proof of the abuses of it, especially in the University of Oxford. Printed 1813: published 1817, pp 97. Hunter, 8vo price 3s 6*d*.

16. Table of Springs of Action (printed anno 1815 published anno 1817. Hunter, 8vo price 2*s*

17. Defence of Economy against Edmund Burke (written 1810) published in the Pamphleteer, No XVI. January, 1817, 8vo. pp. 47

18 Defence of Economy against the Right Honourable George Rose. (written 1810) published in the pamphleteer, No. XVIII January, 1817, pp. 52.

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